

# In the Supreme Court of the United States

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OCTOBER TERM, 1921

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SLOAN SHIPYARDS CORPORATION *et al.*,  
*Appellants*,  
*vs.*

UNITED STATES SHIPPING BOARD  
EMERGENCY FLEET CORPORATION  
and THE UNITED STATES OF AMERICA.

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*Upon Appeal from the United States District Court  
for the Western District of Washington,  
Northern Division*

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## Appellants' Brief

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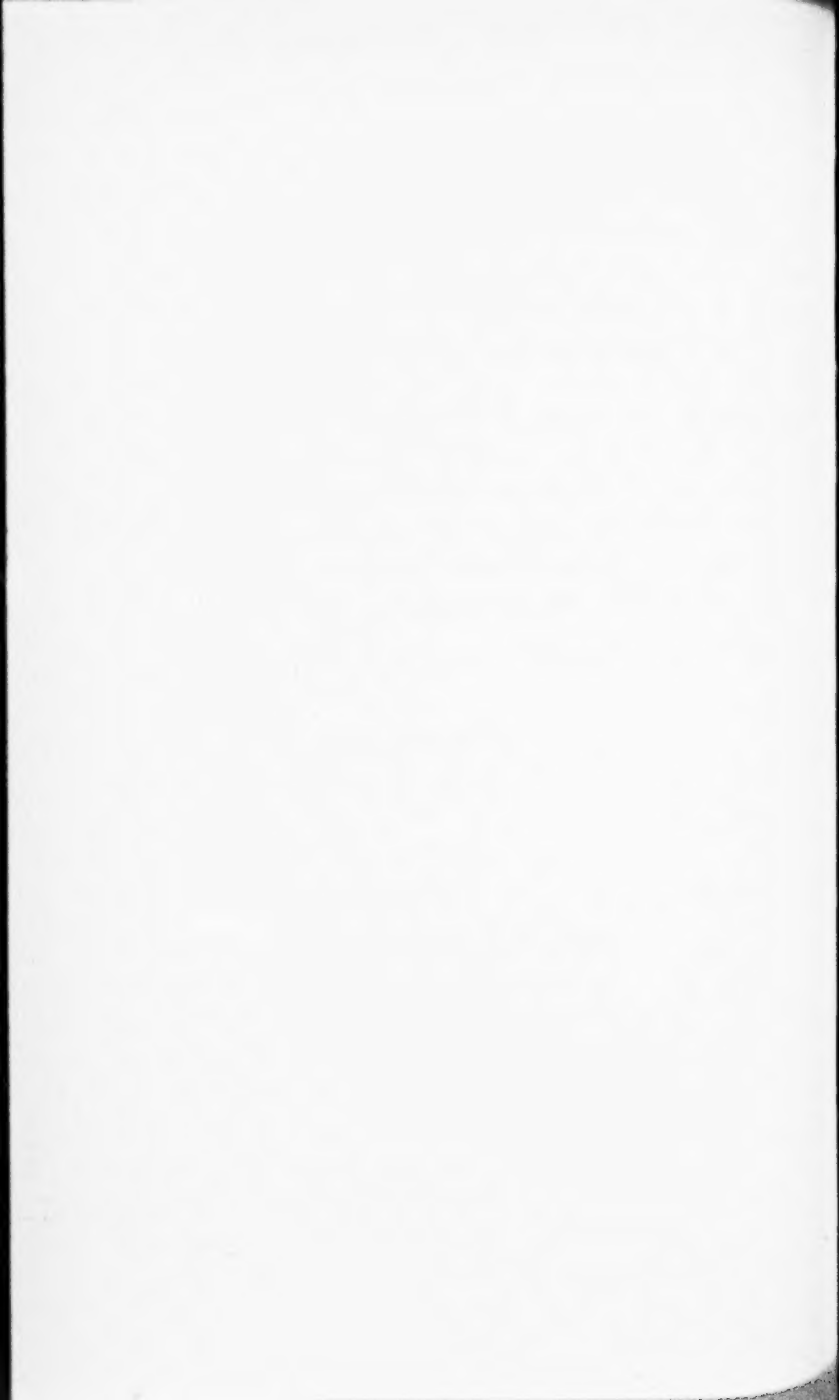
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## Appellants' Brief

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### STATEMENT OF CASE.

This is a direct appeal from a decree of the United States District Court for the Western District of Washington, Northern Division, dismissing for want of jurisdiction an action in equity brought by Sloan Shipyards Corporation, Capital City Iron

Works and Anacortes Ship Building Company, Washington corporations, against United States Shipping Board Emergency Fleet Corporation. The appeal presents the question whether the United States Shipping Board Emergency Fleet Corporation (throughout this brief called Fleet Corporation) is but a department or bureau of the Federal Government and hence immune from suit except in the Court of Claims or whether it is a distinct corporate entity suable generally in the Courts on its contracts as an ordinary private corporation.

The Fleet Corporation was formed on April 16, 1917, by the United States Shipping Board under the incorporation laws of the District of Columbia by authority of section 11 of the Merchants Marine Act of September 7, 1916, which section will be set out later (see certificate of incorporation Rec. p. 34).

On May 18, 1917, thirty-two days after its formation, the Fleet Corporation entered into a certain contract with the Sloan Shipyards Corporation which will be found set out in full as Exhibit A attached to the Amended Complaint (Rec. p. 35). In brief this contract provided that the Sloan Shipyards Corporation should construct and deliver at Olympia, Washington, to the Fleet Corporation six-



teen wood cargo carrying vessels at certain stated intervals, for which the Fleet Corporation obligated itself to pay \$490,000 each in installment payable from time to time.

To more expeditiously execute its contract the Sloan Shipyards Corporation acquired the control of the Capital City Iron Works located at Olympia, Washington, and caused to be formed, as a subsidiary controlled by the Sloan Shipyards Corporation, the Anacortes Shipbuilding Company, located at Anacortes, Skagit County, Washington.

The contract for the sixteen vessels provided (Paragraph 2 Rec. p. 36) that the first installment of the contract price, being eleven per cent, should be paid thirty days after the signing of the contract upon the production by the contractor of a sworn statement that it had expended or was committed on material contracts to an amount equal to such payment and further provided for a second payment of like amount thirty days later upon like conditions.

The balance of the contract price aggregating seventy-eight per cent was to be paid in six equal installments of thirteen per cent each from time to time as the work on the vessels reached different stages of completion. The first two installments

amounting to twenty-two per cent, or \$1,724,800, were paid in compliance with the contract. After the second payment had been made, and before the third installment became due, differences arose between the Sloan Shipyards Corporation and the Fleet Corporation concerning performance of the contract. The exact nature of these differences not being material to the consideration of jurisdictional question now presented, will not be discussed further than to state that as a result the Fleet Corporation refused to advance the third installment and in the latter part of November, 1917, went into actual possession of the Sloan plants before any modification of the original contract had been negotiated. The Fleet Corporation, under no definite arrangement, continued to itself operate the three Sloan plants (namely the main shipbuilding yard of the Sloan Shipyards Corporation at Olympia, the iron works of the Capital City Iron Works at Olympia and the subsidiary shipbuilding plant of the Anacortes Ship Building Company at Anacortes, Washington) from the time it first went into possession in November, 1917, until May 1, 1918, at which time a supplemental agreement was entered into between the Sloan Shipyards Corporation and the Fleet Corporation. This supplemental

agreement will be found attached to the amended complaint as Exhibit B (Rec. p. 41-49).

The supplemental contract, after referring to the execution of the original agreement of May 18, 1917, and to the execution on a contract under date of June 20, 1917, between the Sloan Shipyards Corporation and its subsidiary Anacortes Ship Building Company for the construction of six of the sixteen Fleet Corporation vessels, then makes reference to the first two payments theretofore made under the original contract and the disputes that had arisen concerning its performance. The supplemental contract in its introductory recitals also mentions a certain "Calkins contract" and four motor ships designated as the "Calkins vessels," concerning which an explanation should be made. At the time the Sloan Shipyards Corporation secured its original contract with the Fleet Corporation for the construction of sixteen vessels, it was already engaged in constructing four motor ships at its Olympia shipyards for one R. M. Calkins acting for the Australian Government. After the Fleet Corporation contract had been obtained, work on several of the Fleet Corporation vessels was being prosecuted by the Sloan Shipyards Corporation simultaneously with the work on the so-called four Calkins vessels.

When in November, 1917, the Fleet Corporation entered into possession of the Sloan Shipyards, the four Calkins vessels were then on the shipways in an uncompleted state. The supplemental contract contemplated that the Fleet Corporation should retain that possession and control first assumed during the prior November, and hence it was essential that the contract make provision for the completion of these Calkin vessels for of course it was impracticable that the actual control of the shipyards should be divided. Hence the supplemental contract provided that the Fleet Corporation should complete not only its own sixteen vessels but the four Calkin motor ships as well. The later agreement stipulated for an increase of the contract price of the sixteen Fleet Corporation vessels from \$490,000 to \$550,000 each and then provided that the twenty vessels included in the Calkins and the Fleet Corporation contract should be completed by the Fleet Corporation for the account of the Sloan Shipyards Corporation and at the end of the work an accounting should be had.

Particular attention should be called to two provisions of the supplemental agreement are as follows:

“The shipbuilding contract is modified only

as provided in this agreement but otherwise remains in full force and effect, and *the provisions thereof except where clearly inapplicable, apply to the terms of this agreement*" (Par. VIII Sub. Div. 3, Rec. p. 47).\*

"All the provisions in this Contract except those contained in sub-division numbered VIII, and except as the context otherwise requires, shall be deemed to have taken effect as of the ..... day of November, 1917, which day is intended to be the date upon which the Owner first assumed supervision and control over the accounting and management of the Contractor" (Rec. p. 48).

As we have said, the supplemental contract required the Fleet Corporation to complete all of the sixteen vessels in question for the account of the Sloan Shipyards Corporation, there being no provision in either contract for the cancellation of any of these ships.

The supplemental contract (Par. IV, Rec. p. 44) required the Sloan Shipyards Corporation to give the Fleet Corporation its bond in the penal sum of \$1,000,000 to guarantee the performance of the contract on its part and the repayment of any money advanced by the Fleet Corporation to complete the Calkin ships in excess of the payments received under the Calkin contract. This bond was

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\*The words italicized above through error are omitted from printed transcript.

given by the Sloan Shipyards Corporation and its two subsidiary companies (Exhibit C, Rec. p. 49-50).

To secure the bond the Sloan Shipyards Corporation and its two subsidiaries were required to give a first mortgage on their plants to the Fleet Corporation (Exhibit D, Rec. p. 51-58).

According to the contention of the appellants, this supplemental agreement was no sooner negotiated than the Fleet Corporation began to repeatedly breach the contract in many vital particulars, in consequence of which the existing disputes intended to be settled were but intensified. Again, the exact nature of these new disputes is not material to a decision of the jurisdictional question now presented and therefore will be passed without more particular statement.

Finally the Sloan Corporation on February 11, 1920, filed its original bill in equity in this cause against the Fleet Corporation as defendant (Rec. p. 1-11). Briefly, the purpose of the action as disclosed by the original bill was to clear the title of the complainant of the cloud created by the mortgage; to repossess complainant of its property; to enjoin the Fleet Corporation from removing the corporate books and records and from disposing of

the assets of the shipbuilding plant, and for an accounting under the shipbuilding contract. Upon the filing of the original bill, the United States District Attorney for the Western District of Washington, on behalf of the United States, appeared and filed a motion to dismiss in form as follows:

“And now comes Robert C. Saunders, Attorney of the United States for the Western District of Washington, and protesting that he does not know and does not admit the truth of the allegations contained in the Bill of Complaint filed in the above entitled cause, and appearing only for the purpose of this motion, suggests to the Court, and gives it to understand and be informed, that this suit, being a suit against the United States Shipping Board Emergency Fleet Corporation, a corporation which is solely an agency of the Government of the United States a majority of the stock of which is and at all times has been owned by the United States, is in effect a suit against the United States, intervening herein, and so far as it is based upon the taking of the property of complainants, is therefore one not cognizable in a court of equity, but only in the Court of Claims at Washington, D. C., when brought in the manner provided by law, the amount claimed being in excess of \$10,000.00, if, indeed, under the circumstances set forth in said bill, the case made by said bill, as to the taking of property, is presently cognizable in any court, in view of the provisions of law for just compensation, to be determined by the President of the United States, for such taking of property as is alleged in said bill of complaint, and for the institution of suit against

the United States in a Court of Claims when, and only when, the amount so determined is unsatisfactory to the party to whom it is awarded, such a suit to be one only for the amount claimed over and above seventy-five per centum of the amount so awarded; and that, insofar as it is a suit for damages sounding in *tort* said suit is not maintainable against the United States or said corporation defendant in this or any other Court, either upon the equity or the law side.

“Wherefore, without submitting the rights of the United States to the jurisdiction of the Court, but respectfully insisting that the Court has no jurisdiction of the subject in controversy either in equity or law, and submitting whether, in consideration of the premises, the Court will take cognizance of this cause, said attorney of the United States moves that said bill of complaint be set aside and dismissed and all proceedings in said suit stayed, and prays for such other orders as may be proper in the premises” (Rec. p. 11-12).

At or about the same time the United States Attorney and another appearing for the Fleet Corporation, filed a motion to dismiss in form as follows:

“Comes now the above named defendant, United States Shipping Board Emergency Fleet Corporation, by the United States District Attorney for the Western District of Washington, and Howard G. Cosgrove, attorneys for said defendant, and move that plaintiff's bill in equity herein be dismissed upon the following grounds, to-wit:



## I.

"That this suit, being one against the United States Shipping Board Emergency Fleet Corporation, a corporation which is solely an agency of the Government of the United States, is a suit in effect one against the United States, and, therefore, not cognizable in this court insofar as said bill may allege a breach or breeches of contract; and not cognizable in any court insofar as said bill may allege the commission of a *tort* or *torts*. This court, therefore, is without jurisdiction of the subject-matter in controversy either in equity or at law.

## II.

"That this court does not have jurisdiction herein, even though it should be held that the said defendant is not generally an agency of the United States.

## III.

"That said bill does not state facts sufficient to constitute a valid cause of action, either in equity or at law against the said defendant.

## IV.

"That there is a non-joinder of defendants, in that, the Capital City Iron Works and the Anacortes Shipbuilding Company, corporations named in said bill, are proper and necessary parties to this action" (Rec. p. 12-13).

After argument his Honor, Judge Neterer, on October 4th, 1920, filed a decision sustaining these motions to dismiss (Rec. p. 14-19). It then being suggested to the court that the case of *United States*

*vs Strang*, 254 U. S. ...., was then pending in this court the entry of a decree was withheld to await that decision. After the decision of this court in the *Strang case*, had been rendered, the motions to dismiss were again argued, and again His Honor, Judge Neterer, rendered a decision sustaining the objections made to his jurisdiction (Decision of March 12th, 1921, Rec. p. 19-21).

In the motion to dismiss the original complaint filed by the Fleet Corporation, not only was the jurisdiction of the court challenged, but the objection was also made that in any event the Capital City Iron Works and Anacortes Shipbuilding Company were necessary parties to the proceeding. In his original decision Judge Neterer sustained the motion to dismiss on both these grounds (Rec. p. 18). Hence, after the District Court by the second decision of March 12th, 1921, had definitely sustained the jurisdictional objection, an amended complaint was filed (Rec. p. 21-33). The primary purpose of the amended complaint was to bring in as complainants the Anacortes Shipbuilding Company and the Capital City Iron Works, as required by the first decision. The amended complaint also varies from the original in a number of particulars, by a more detailed statement of several matters in

controversy. These modifications, however, are not material to the jurisdictional question involved, except that the certificate of incorporation of the Fleet Corporation is attached as an exhibit (Rec. pp. 34-35; Ex. 1); and in the amended complaint it is specifically alleged that the original contract out of which the litigation arises was made by the Fleet Corporation at a time when it possessed no powers or authority save only such as it derived from the corporation laws from the District of Columbia and its articles of incorporation (Amended Complaint, Par. V, Rec. p. 22).

Upon the filing of the amended complaint, a motion to dismiss for want of jurisdiction was again interposed by the United States and by the Fleet Corporation (Rec. p. 59-60). This motion to dismiss the amended complaint being submitted to the court, a decree dismissing the action for want of jurisdiction was entered (Rec. p. 60); on March 28th, 1921, and thereafter, during the term, the court made the certificate requisite to an appeal to this court (Rec. p. 61).

## SPECIFICATIONS OF ERROR.

## I.

The District Court erred in holding that the defendant United States Shipping Board Emergency Fleet Corporation is but a branch, bureau, or department of the Federal Government, and not a distinct corporate entity, suable as such.

## II.

The District Court erred in sustaining the motion to dismiss the Amended Bill of Complaint.

## III.

The District Court erred in holding that it is without jurisdiction to entertain this action and in dismissing the action for want of jurisdiction.

## POINTS AND AUTHORITIES.

## I.

THE FLEET CORPORATION IS A DISTINCT CORPORATE  
ENTITY AND SUABLE AS ANY PRIVATE  
CORPORATION.

*Lake Monroe Case*, 250 U. S. 246.

*Commonwealth Finance Corporation vs. Landis*, 261 Fed. 440.

*Gould Coupler Co. vs. Fleet Corporation*, 261 Fed. 716.

*Lord and Burnham Co. vs. Fleet Corporation*, 265 Fed. 955.

*Southern Bridge Co. vs. Fleet Corporation*, 266 Fed. 749.

*Perna vs. Fleet Corporation*, 266 Fed. 896.

*Banque-Russo, etc. vs. Fleet Corporation*, 266 Fed. 897.

*Ingram Day Lumber Co. vs. Fleet Corporation*, 267 Fed. 283.

*Federal Sugar Refining Co. vs. U. S. Sugar Equalization Board, Inc.*, 268 Fed. 575.

*Pope vs. Fleet Corporation*, 269 Fed. 319.

*United States vs. Strang*, 254 U. S. ....

*American Cotton Oil Co. vs. Fleet Corp.*, 270 Fed. 296.

*Ingersoll-Rand Co. vs. Fleet Corporation*, 187 N. Y. S. 695.

*Haines vs. Lone Star Shipbuilding Co.*, 268 Pa. 92; 110 Atl. 788.

*Eickberg vs. Fleet Corporation*, 273 Fed. 886.

#### CONTRA.

*Sloan Shipyards Corporation vs. Fleet Corporation*, (this case) 268 Fed. 624.

*Ballaine vs. Alaska Northern Railway Co.*, 259 Fed. 183.

*Astoria Marine Iron Works vs. Fleet Corporation*, 270 Fed. 635.

*Keeley vs. Kerr*, 270 Fed. 874.

*U. S. vs. Carlin*, 259 Fed. 904.

*U. S. vs. Union Timber Products Co.*, 259 Fed. 907.

#### II.

THE DOCTRINE OF GOVERNMENTAL IMMUNITY HAS BUT LITTLE PLACE IN THIS COUNTRY.

*United States vs. Lee*, 106 U. S. 196; 27 L. E. 171.

*Gould Coupler Co. vs. Fleet Corporation*, 261 Fed. 716.

*Federal Sugar Refining Co. vs. U. S. Sugar Equalization Board, Inc.*, 268 Fed. 585.

#### III.

WHEN THE WORDS OF A CORPORATE CHARTER ARE PLAIN EXTRINSIC FACTS WILL NOT BE CONSIDERED.

*Ruggles vs. Illinois*, 108 U. S. 536; 27 L. E. 812.

## IV.

THE POWER TO SUE AND BE SUED IS AN ESSENTIAL  
ELEMENT OF CORPORATE EXISTENCE.

*B. & O. R. R. vs. Harris*, 12 Wall 65; 20 L. E. 354.

1914A *Corpus Juris*, Page 785, Section 2862.

*Thompson's Commentaries on Corporations*,  
Vol. 6, Sections 7360-7361.

7 *R. C. L.*, Page 689, Sections 690-691.

*Instone vs. Frankfort Bridge Co.*, 5 Am. Dec. 638, p. 641.

*Capitol Lumber Co. vs. Learned*, 36 Ore. 544;  
78 Am. St. Rep. 792.

*Martin vs. Kentucky Land Investment Co.*,  
102 S. W. 1038.

*Gross vs. Kentucky Board, etc.*, 49 S. W. 458;  
43 L. R. A. 703.

## V.

EXCLUSIVE OWNERSHIP OF STOCK BY UNITED STATES  
DOES NOT CONFER IMMUNITY.

*Bank of U. S. vs. Planters Bank of Georgia*,  
9 Wheat 904; 6 L. E. 244.

*Bank vs. Wister*, 2 Peters 318; 7 L. E. 437.

*Brisco vs. Bank*, 11 Peters, 257; 9 L. E. 709.

*Darrington vs. Bank of Alabama*, 13 Howard,  
12; 14 L. E. 30.

*U. S. vs. Strang*, 254 U. S. ....

*Salas vs. U. S.*, 234 Fed. 842.

*Panama R. Co. vs. Curran*, 256 Fed. 772.

## VI.

THE CREATION BY CONGRESS OF A CORPORATION TO FACILITATE THE DISCHARGE OF A GOVERNMENTAL FUNCTION DOES NOT IN ITSELF IMPLY IMMUNITY FROM SUIT.

*McCulloch vs. Maryland*, 4 Wheat, 315.

*Osborne vs. Bank*, 9 Wheat, 708.

*Bank vs. Deering*, 91 U. S. 29; 23 L. E. 196.

*Davis vs. Elmira Savings Bank*, 161 U. S. 275; 40 L. E. 700.

*Thompson vs. U. P. R. R. Co.*, 9 Wall 759; 19 L. E. 792.

*U. P. R. R. Co. vs. Peniston*, 18 Wall 5; 21 L. E. 787.

*U. S. vs. U. P. R. R. Co.*, 8 Otto 569; 25 L. E. 143.

*U. S. vs. U. P. R. R. Co.*, 9 Otto 700; 25 L. E. 496.

*Pacific Removal Co. Cases*, 115 U. S. 1; 29 L. E. 319.

*California vs. Central Pacific R. R. Co.*, 127 U. S. 1; 32 L. E. 150.

*Luxton vs. North River Bridge Co.*, 152 U. S. 529; 38 L. E. 808.



## VII.

JURISDICTION OF SUITS AGAINST FLEET CORPORATION  
NOT LODGED EXCLUSIVELY WITH COURTS  
OF DISTRICT OF COLUMBIA.

*Bankers Trust Co. vs. Texas and Pacific Rail-  
way Co.*, 241 U. S. 295; 60 L. E. 1010.

*B. & O. R. R. Co. vs. Harris*, 12 Wall 65; 20  
L. E. 354.

## VIII.

THE DISTRICT COURT HAS JURISDICTION OF THIS  
PARTICULAR CASE EVEN THOUGH IT LACKS JUR-  
ISDICTION GENERALLY IN SUITS AGAINST FLEET  
CORPORATION.

THE FLEET CORPORATION IS A DISTINCT  
CORPORATE ENTITY AND SUABLE  
AS ANY PRIVATE BUSINESS  
CORPORATION.

The Merchant Marine Act of September 7th, 1916, passed by Congress before the United States entered the European War, was, as indicated by its title, for three primary purposes:

(a) To create a naval auxiliary and naval reserve;

(b) To create a merchant marine to meet the requirements of the commerce of the United States;

(c) To regulate carriers by water engaged in foreign and interstate commerce.

The first purpose indicated is purely and exclusively governmental in its nature. Likewise the third purpose stated. The second purpose, however, is but a manifestation of the constitutional power to aid commerce by water in a broad way exactly as Congress on former occasions has aided commerce by land by creating and extending subsidies to many of the interstate railroad companies. In other words, the act comprehends not purely governmental functions only but commercial functions as well. Section 11 of the act which especially authorizes the

formation of the Fleet Corporation, provides in part as follows:

“The Board, if in its judgment, such action is necessary to carry out the purposes of this Act, may form, under the Laws of the District of Columbia, one or more corporations *for the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States.*”

This section then goes on to provide: the amount of the capital stock; that the United States may become a stockholder but shall never be a minority stockholder; that the corporation, while the United States is a stockholder, shall not engage in the operation of merchant vessels until after an effort has been made to provide for purely private operation. The section further provides for the dissolution of the corporation five years after the conclusion of the European War, provided the United States is then a stockholder. The other pertinent sections of the act are quoted in the *Lake Monroe Case*, 250 U. S. 246, and need not be repeated here. It is noticeable that the Shipping Board was authorized to form a corporation only for the discharge of the commercial powers delegated to it with respect to the construction and operation of merchant vessels engaged in the commerce of the United States. The purely govern-

mental functions were reserved to be exercised by the Shipping Board itself.

The Shipping Board exercising the authority so given to it, on April 16th, 1917, formed the Fleet Corporation by the execution of a Certificate of Incorporation, which, so far as material to the present inquiry, reads as follows:

“First. That the corporate name of this company shall be United States Shipping Board Emergency Fleet Corporation, and the object for which it is formed is the purchase, construction, equipment, lease, charter maintenance and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business, as authorized by the Laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia, upon corporations under said subchapter four (4) of the corporation laws of the District of Columbia.

“Second. That the existence of this corporation shall be perpetual” (Rec. p. 34).

The general incorporation law of the District of Columbia under which this corporation was formed, provides:

“When the certificate shall have been filed in accordance with the provisions of the preceding section, the persons who shall have signed and acknowledged the same and their

successors shall be a body politic and corporate in fact and in name by the name stated in such certificate, and by that name have succession, and be capable of suing and being sued in any court of law or equity in the District." (Reference—Code of District of Columbia, section 670, sub-chapter 4, p. 159).

The charter powers of the Fleet Corporation, as defined in its certificate of incorporation, conform exactly to the limitations of section eleven, of the Merchant Marine Act, being confined to the acquisition and operation of merchant vessels with the incidental power to do all things necessary or expedient for the efficient and profitable conduct of that of commercial business. When forming this corporation, the Shipping Board evidently anticipated that ultimately all the stock would pass into private ownership, for it provides for the perpetual existence of the corporation and not for its dissolution, five years after the expiration of the European War, as was required if it had been intended that the United States would continue as a stockholder.

Thirty-two days after the creation of this corporation, namely, on May 18th, 1917, while the corporation was endowed with none except the charter powers we have mentioned, the original contract, out of which this litigation arises was executed be-

tween the Sloan Shipyards Corporation and the Fleet Corporation. By reference to that contract (Rec. p. 35), it will be seen that there was no pretense at that time that the Fleet Corporation was exercising or attempting to exercise purely governmental functions, for the contract relates to the construction of *sixteen wood cargo carrying steamers*, in other words, to *sixteen merchant vessels* which the Fleet Corporation by its charter was empowered to acquire and operate in the foreign and interstate commerce of the United States. It was not until June 15th, 1917, that Congress, by the Urgent Deficiencies Appropriation Act (chapter 29, 40 Statutes at Large, 182), conferred upon the President the war powers relating to the construction and operation of merchant vessels; and it was not until July 11th, 1917, nearly two months after the execution of the contract, that the President actually delegated certain of those powers to the Fleet Corporation which are now claimed to have carried with them governmental immunity to the Fleet Corporation.

In this case we make two contentions:

First, that the Fleet Corporation is suable with respect to all its transactions relating to the construction, acquisition and operation of merchant

vessels, whether such transactions arose prior or subsequent to the President's Executive Order of July 11th, 1917;

Second, that even if it be admitted that the character of the Fleet Corporation was completely changed by the Executive Order of July 11th, 1917, nevertheless the Fleet Corporation is suable in this case, and the District Court has jurisdiction to entertain the suit, because this litigation arises out of a contract antedating the President's Order and antedating the Act of Congress authorizing the President to issue that Order.

The first case bearing on the suability of the Fleet Corporation is *The Lake Monroe*, 250 U. S. 246; but, before noticing in detail the holding in that case, we will discuss the cases in lower Federal Courts directly involving the suability of the Fleet Corporation.

The first of these decisions, in point of time, is that of Judge Dickinson of the Eastern District of Pennsylvania, in *Commonwealth Finance Corporation vs. Landis*, 261 Fed. 440. In this case the Fleet Corporation was summoned to answer as a garnishee defendant, and consolidated with it for the purposes of decision was another case of the

same kind and two other cases in which the Fleet Corporation was the principal defendant. The objection was made that the Fleet Corporation was immune from judicial process, either as a principal or as a garnishee defendant, on the theory, as expressed by Judge Dickinson, that it is "clothed in the royal purple of sovereignty."

After noticing the organization of the Fleet Corporation and expressing the view that the Fleet Corporation might be considered as possessing a dual personality so that it might be sued with respect to some of its transactions and yet be immune from suit with respect to others, Judge Dickinson said (p. 443):

"There is this very practical and common-sense view of the broad question here involved and of the general situation presented. Private persons and individuals must deal with this corporation as contractors or otherwise in the accomplishment of the work with which the corporation has to do. Supplies or material must be furnished to the corporation and to those who have contracted with it. Obligations of some kind to make payment must be incurred. Congress has found it to be best to so provide that the United States shall not directly incur these obligations. If the obligations incurred were the obligations of the United States it has so far laid aside the robes of sovereignty as to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts. If this remedy was pur-



sued by any one having a claim, no matter how just that claim might be, the United States might very well interpose the defense that it had not incurred any obligation, and the foregoing remedy would be denied the claimant. If the corporation was not amenable to process, then the intolerable situation would be presented that the corporation was free to admit or repudiate the obligations at its free will and pleasure. The sovereign, it must be considered, cannot be sued without its consent; but the doctrine must also be accepted that he may consent.

“We are certainly justified in assuming that Congress, by its legislation on the subject, intended that the obligation which necessarily must be incurred will be met either by the United States or this corporation, and that it was further intended that the existence and extent of such obligations should be determined either as against the United States or as against the corporation, and as Congress has not seen fit to have the United States directly assume the obligation and has not provided any way in which any question which may arise may be determined in favor or against the United States, the further inference is justified that Congress intended that whatever obligations were incurred were incurred by this corporation, and has further intended that such questions as arise may be determined in favor or against the corporation. If the above inferences are justified, then one of two things follow: Either that the corporation is not immune from the service of process by virtue of its public character, or if it is the United States, in doing whatever it does, then the United States has con-

sented to the bringing of appropriate actions against it."

To the extent that Judge Dickinson expressed the view that, in one aspect, the Fleet Corporation might be considered as identical with the government, he was, as appears from his opinion, influenced largely by the decision of his associate, Judge Thompson, of the same district, who, in the case of *United States vs. Carlin*, 259, Fed. 904, had held that a conspiracy to defraud the Fleet Corporation is a conspiracy to defraud the United States. That decision of Judge Thompson is, however, in direct conflict with the later decision of this court in *United States vs. Strang*, 254, U. S.

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The next decision directly involving the suability of the Fleet Corporation is that of Judge Learned Hand of the Southern District of New York in *Gould Coupler Co. vs. Fleet Corporation*, 261, Fed. 716.

After noticing the legislation under which the Fleet Corporation was brought into existence and the decision of this court in the *Lake Monroe case*, 250, U. S. 246, Judge Hand concluded that the Fleet Corporation is suable as any other corporation created under the General Incorporating Act of the

District of Columbia. Judge Hand said (p. 717):

"Now, in these cases it appears to me too clear for dispute that the Fleet Corporation is in general capable of being sued. Section 11 of the Shipping Act (Comp. St. p. 8146f) provides that the Corporation shall be chartered under the laws of the District of Columbia, and no one disputes that this means under the general corporation law. The corporation was so formed under Code of Law D. C. c. 18 subchapter 4, which authorized actions by and against any corporation so organized. The Fleet Corporation was therefore meant to be a legal person without immunity quite as much as any other corporation. In view of these provisions it is unnecessary to consider any of the cases touching the general liability to process of corporations in which the United States may be a stockholder or which it may organize for governmental purposes."

Judge Hand then proceeded to examine the *Lake Monroe* decision and concluded that, according to that decision, the President, when he saw fit to select the Fleet Corporation as an agency of the Executive for war purposes, must be presumed to have deliberately taken the corporation as he found it with all its capabilities and limitations.

Further on Judge Hand said (p. 718):

"Moreover, it is in general highly desirable that, in entering upon industrial and commercial ventures, the governmental agency used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities

and the same tribunals as other persons or corporations similarly employed. The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the majority of cases arising from governmental activities which are increasing so fast. At least I have no disposition to strain the point in their favor, where they fall clearly within the principle of authoritative decisions."

The next decision in chronological order is that of Circuit Judge Page of the Northern District of Illinois in *Lord & Burnham Co. vs. Fleet Corporation*, 265 Fed. 955. This was an action at law to recover damages for breach of a contract dated October 25, 1918, which, it will be noticed, was subsequent to the President's proclamation delegating war powers to the Fleet Corporation. After noticing the legislation by which the Fleet Corporation was brought into existence, Judge Page said (p. 957):

"It must be assumed, from the very fact of the provision for the incorporation of the defendant, that it was intended that it should be a real corporation, with all its powers, rights, and obligations intact. To hold otherwise would be to hold that Congress did the wholly purposeless thing of incorporating a corporation, which should not be a corporation at all, to perform, under the Board, things which, as a governmental agency, the Board had ample authority to do."

After noticing the subsequent legislation and executive orders urged as a basis for claiming governmental immunity, and finding therein no indication of a Congressional intent to confer immunity but rather a contrary Congressional intent, Judge Page concluded his opinion thus (p. 959):

“It is not to be believed, except on the clearest evidence, that Congress, when it authorized the incorporation of the defendant under the general laws of the District of Columbia, to forward a specific, limited and purely commercial undertaking, intended to take away all those corporate rights and leave those who might deal with the corporation no place to adjudicate their rights, except in and through the slow and cumbersome process of the Court of Claims \* \* \*”

The next decision in chronological order is that of District Judge Ervin of the Southern District of Alabama in *Southern Bridge Company vs. Fleet Corporation*, 266, Fed. 747. This was a suit brought by the bridge company in a state court and removed on petition to the United States District Court. Upon the filing of the record in the Federal Court, a plea in abatement was filed by the defendant, asserting immunity. Judge Ervin stated that he agreed with Judge Dickinson in the *Landis case* and with Judge Hand in the *Gould case* in holding the Fleet Corporation liable to suit in the Federal

Courts, but stated that the question for determination in the particular case before him was whether the state courts have jurisdiction of a suit against the Fleet Corporation, stating (p. 749):

“I have been unable to find any case in which this question has been determined, nor has any such case been cited to me in argument.”

Judge Ervin overruled the demurrers to the plea in abatement, thus holding that the Fleet Corporation could not be sued in the state courts, though agreeing that it is suable by original process in the Federal Courts:

“I conclude, as did Judge Dickinson and Judge Hand, that the United States have provided that this defendant could be sued in the United States District Court; but there is nowhere that I can find any authority for suing such a corporation in a state court; and, as I further conclude that this corporation is a governmental agency of the United States, I find that the state court had no jurisdiction to entertain a suit against it.” (p. 752.)

In holding this corporation suable in the Federal Court but not suable in the State Court, Judge Ervin did so without having his attention called to any authority touching the precise question. If his attention had been called to *Bankers' Trust Co. vs. Texas & Pacific Railway Co.*, 241 U. S. 295, he no doubt would have held the Fleet Cor-

poration suable in the first instance in the State Courts as well as in Federal Courts, although of course such suits would be removable if involving the requisite amount. This decision of Judge Ervin is, however, an authority for our position, for it is in agreement with those prior decisions broadly holding the Fleet Corporation suable as a private business corporation.

The next decision in point of time is that of District Judge Thompson of the Eastern District of Washington, in *Perna vs. Fleet Corporation*, 266 Fed. 896. Judge Thompson had previously held, in *United States vs. Carlin*, 259, 904, that corporate identity of the Fleet Corporation is so absorbed, as it were, in the United States, that a conspiracy to defraud the Fleet Corporation is a conspiracy to defraud the United States. Nevertheless, Judge Thompson, in the *Perna case*, said that he agreed entirely with the reasoning of Judge Hand holding the Fleet Corporation suable in a civil action.

The same view was again expressed by Judge Thompson the following day in *Banque-Russo, etc. vs. Fleet Corporation*, 266 Fed. 897.

The next decision in chronological order is that of District Judge Holmes of the Southern District of Mississippi, in *Ingram-Day Lbr. Co. vs. Fleet*

*Corporation*, 267 Fed. 283. This was a suit brought by the lumber company against the Fleet Corporation in one of the state courts of Mississippi and removed on petition to the United States District Court. Upon the filing of the record in the District Court the plaintiff moved to remand, and the United States Attorney, on behalf of the Fleet Corporation, moved to dismsis, asserting immunity from suit. The action was to recover \$906.26 due the plaintiff for shipbuilding material. Judge Holmes, first considering the motion to remand, concluded that the case was not properly removed under that section of the judiciary act which permits of a removal when the suit arises under the laws of the United States, because the requisite amount was not involved. Judge Holmes, however, sustained the removal, although the amount involved was less than three thousand dollars, on the theory that the Fleet Corporation, having been incorporated pursuant to Section 11 of the Merchant Marine Act of September 7, 1917, the suit was removable as one arising under a law regulating commerce. No authority to sustain the removal on this ground was cited. The fact is the removal could not properly be sustained upon that ground for a suit merely to recover the purchase price of material is not a suit arising



under a law regulating commerce, because such a suit does not involve the validity, construction, or effect of the Merchant Marine Act as a law regulating commerce. If Judge Holmes' attention had been called to *Shulthis vs. McDougal*, 225 U. S. 561, and the other cases therein cited, doubtless he would have been unwilling to place his decision on this ground. In that case this court said:

“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.”

It will serve no good purpose to further pursue this particular question for it is purely collateral to the jurisdictional question presented on this appeal.

Having denied the motion to remand, Judge Holmes proceeded to consider the motion to dismiss, and denied that motion upon the theory that, until the introduction of evidence, he could not determine whether the claim was one upon which the Fleet Corporation was liable in its corporate capacity or was one on which the Fleet Corporation would be immune as the agent of the President discharging war powers. The general effect of this decision

is that the Fleet Corporation is suable as a private corporation, although there may be cases in which the nature of its transactions are such as to exempt it from suit.

The next decision is that of District Judge Mayer of Southern District of New York, in *Federal Sugar Refining Co. vs. United States Sugar Equalization Board, Inc.*, 268 Fed.575. As its title indicates, this case was not against the Fleet Corporation but against another corporation, created to assist the government in its war activities. The case is, however, we believe, directly in point, because any considerations which would exempt the Fleet Corporation from suit would likewise exempt the Sugar Board, and any reasons that would render the Sugar Corporation suable would compel the same conclusion as to the Fleet Corporation.

The action arose out of a rather complicated set of facts which we do not think it essential to state further than to say that the Sugar Board interposed the defense that being created as an agent of the sovereign it was immune. This corporation was formed under the corporation statutes of the state of Delaware, which provide that every corporation created under its provisions shall have the power

“to sue and be sued, complain and defend in any court of law or equity, \* \* \* to conduct business in this state, other states, the District of Columbia, the territories and colonies of the United States and foreign countries \* \* \*.”

In other words, the Sugar Board was formed under the laws of Delaware which specifically made it suable, just as the Fleet Corporation was formed at the direction of Congress under the law of the District of Columbia, which, with equal emphasis, declares that it can sue and be sued.

Discussing the suability of the defendant in the case before him, Judge Mayer said:

“If the sovereign chooses as its agent a state corporation which can be sued, it cannot, by *ipse dixit*, deprive one injured by such an agent of the right to sue. The state of Delaware allowed the defendant to be created, but as a condition of its creation and existence it afforded the right to any one to sue the corporate being which it thus created. It is alleged that, upon ‘the direction’ of the President, defendant was incorporated. This is but another way of saying that the President directed that the necessary number of persons required under the Delaware statute should take the steps necessary under that statute to incorporate a defendant subject to the liabilities of that statute. Neither the Executive nor any person acting with authority under him had the power to change the obligations, rights or liabilities of a corporation which was the creature of the statute, i. e., the creature of the sovereign state of Delaware.”

If Judge Mayer is correct in stating that the President, cannot change the Delaware statute in the particular mentioned, there is equal reason, or even stronger reason, for saying that when the Congress has said a corporation created by it is suable, it is not for the President to make it immune. Further on in his opinion Judge Mayer said (p. 586):

“But the incorporation under a state statute of a business corporation cannot deprive the agent thus created of its right as a corporation to make a profit nor relieve it of its corporate liabilities \* \* \* but when the sovereign uses an agency created, not by itself but under state statute, he takes his agent as he finds it. \* \* \* No case has been, nor can be cited which authorizes the President of the United States to change a state statute, or the powers conferred thereby, or the liabilities necessarily flowing therefrom.”

So, likewise, when the Executive Department of the government chooses to use as its agent a corporation which Congress has created and declared to be suable, manifestly, that agent must be taken as it is found, for no authority can be cited to sustain the contention that the President of the United States is authorized to change an act of Congress.

After commenting upon the decision of this court in *United States vs. Planters Bank of Georgia*,

9 Wheat. 904, holding that stock ownership by the sovereign does not, in itself, imply immunity from suit, Judge Mayer concluded his opinion thus (p. 586):

“In enacting the statutes *supra*, Congress intended, *inter alia*, to conserve necessities during the war, and therefore, conferring large and almost unlimited powers to select agencies to that end, it is fair to assume that Congress realized that it might be necessary to engage in commercial transactions. The very incorporation of the defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate and doubtless subject to embarrassment by a maze of unworkable statutes and regulations and the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business concerns. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right, but only, if at all, as a matter of the favor of the sovereign. \* \* \*

The whole tendency is against the extension of the immunity of the sovereign as against proper suitors \* \* \*.”

The next decision is that of District Judge Call, of the Southern district of Florida, in *Pope vs. Fleet Corporation*, 269 Fed. 319, an action for breach of a contract for the sale of certain material. In brief, Judge Call held the Fleet Corporation a legal entity, with the power to be sued.

The next decision in order of time is that of this court in the case of *United States vs. Strang*, 254 U. S. Strang and others were indicted for a conspiracy to defraud the United States, upon the theory that the identity of the Fleet Corporation was so far merged in that of the United States that an employee or agent of the Fleet Corporation was, in effect, an employee or agent of the government. A demurrer to the indictment was sustained by the District Court, and, upon appeal, by this Court. The ground upon which the government sought a reversal was stated by Mr. Justice McReynolds as follows:

“Counsel for the government maintain that the Fleet Corporation is an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President and by him delegated to it; that the acts of the corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation while

performing the duties as inspector Strang necessarily acted as agent of the United States."

By sustaining the demurrer to the indictment, this Court squarely held contrary to the government contention and therefore in effect held that the Fleet Corporation is not an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers, and that the acts of the corporation are not the acts of the United States. In view of the explicit holding in the *Strang* case there is not, in our opinion, any room to differentiate between civil and criminal action, as Judge Neterer, in his second opinion in this case (Record p. 20), and Judge Wolverton of the Oregon District in the *Astoria Marine Iron Works* case, 270, Fed. 635, have attempted to do. The *Strang* decision, as we read it, is placed squarely upon the proposition that the Fleet Corporation is a corporate entity entirely distinct from the government, having its own organization, officers and employees, who have no authority to contract on behalf of the United States but only authority to contract for the corporation itself. There is no intimation in the *Strang* decision that the case turned especially upon any rule for the strict construction of penal statutes. On the contrary, it is quite plain that

the decision was placed upon the broad ground that the Fleet Corporation is not the government.

The next decision, in order of time, is that of District Judge Foster of the Eastern District of Louisiana, in *American Cotton Oil Co. vs. Fleet Corporation*, 270 Fed. 296, an action at law for damages to a wharf injured by a Fleet Corporation vessel. Judge Foster evidently understood the *Strang* decision as broadly declaring the separate identity of the Fleet Corporation for all purposes, and overruled the claim of immunity in this *tort* action, saying (p. 297):

“There is no good reason why the corporation should not be sued for damages arising from tort as well as from breach of contract. The question may arise as to whether or not the property of the corporation may be seized and sold to satisfy a judgment, but there is no need to consider that in connection with the exception in this case. After the plaintiff has established his claim, if he does so, there will be time enough to consider the method of collection.”

In line with the several decisions of the lower Federal Courts to which we have just called attention is that of the Appellate Division of the Supreme Court of New York, in *Ingersoll-Rand Co. vs. Fleet Corporation*, 187 N. Y. S. 695. This was an action begun in the Supreme Court of New York



to recover a balance due on the purchase price of certain tools furnished to the Fleet Corporation, the amount involved not being sufficient to permit of removal. The trial court denied an objection made to its jurisdiction; and its action in that respect was re-examined by the Appellate Division. Without quoting at length from that opinion, it suffices to say that the court held that the Fleet Corporation, by reason of its creation under the laws of the District of Columbia at the direction of Congress, was suable as a business corporation. Concerning the subsequent legislation by which extraordinary war powers were conferred on the President, and by him delegated to the corporation, the court said:

“These subsequent statutes and orders have no particular bearing on the case under consideration, as they in no way change the character or purpose of the original act or the charter powers of the defendant. *The transaction for which it is sought in this action to hold it responsible was well within its original charter powers.* \* \* \* The business in which this defendant corporation was to be engaged was such as had theretofore been conducted by private persons and corporations. The building, purchasing, leasing and operating of ships from time out of mind had been conducted by private enterprise. When the government decided to invest capital in such business, it authorized the incorporation of a business corporation and became a stockholder therein. Such

corporation, and not the government, became liable for its debts, and satisfaction for such debts is to be obtained out of its property, and not as a claim against the United States. Therefore, where its agent, a New York corporation, purchased merchandise in the city of New York from a corporation authorized to do business in, and therefore a resident of, this state, the courts of this state have jurisdiction over the cause of action, and by service of process the Supreme Court has acquired jurisdiction of the defendant."

Noticing the decisions of the lower Federal Courts on the subject, the New York court said it was not necessary to reconcile them, for, in its judgment, the decision of this court in the *Strang case* settled the matter in civil as well as in criminal actions.

In *Haines vs. Lone Star Ship Building Co.*, 268 Pa. 92; 110 Atl. 788, the Supreme Court of Pennsylvania denied immunity asserted on behalf of the Fleet Corporation.

In *Eichberg vs. Fleet Corporation*, 273 Fed. 886, the Court of Appeals of the District of Columbia denied immunity and held the Fleet Corporation suable with respect to all its transactions, citing the *Strang case* to that effect.

We understand from press reports that the Circuit Court of Appeals of the Second District has

held the same way; but at the time of writing this brief the decision is not available.

The decisions of the lower Federal Courts which either directly hold or tend to establish that the Fleet Corporation is not suable are

1. The decision of District Judge Thompson in *United States vs. Carlin*, 259 Fed. 904.
2. The decision of Judge Neterer in *United States vs. Union Timber Products Co.*, 259 Fed. 907.
3. The decision of the Circuit Court of Appeals of the Ninth Circuit in *Ballaine vs. Alaska Northern Railway Co.*, 259 Fed. 183.
4. The decision of Judge Neterer in the present case.
5. The decision of Judge Wolverton of the Oregon District in *Astoria Marine Iron Works vs. Fleet Corporation*, 270 Fed. 635; and
6. The decision of Judge Bean of the Oregon District in *Keeley vs. Kerr*, 270 Fed. 374.

The decisions of District Judges Thompson and Neterer in the *Carlin* and *Union Timber Products* cases are in direct conflict with the subsequent decision of this court in the *Strang* case, and nothing more need be said of them.

The decision of Judge Bean in *Keeley vs. Kerr*, 270 Fed. 874, was put upon the ground that the *Ballaine* case is controlling in the Ninth Circuit. Judge Bean, in his opinion, does not notice the

*Strang* case, and his conclusion is irreconcilable with that decision if we correctly construe it.

The decision of Judge Wolverton in the *Astoria Iron Works* case but follows the decision of Judge Neterer in this present case. While Judge Wolverton notices the *Strang* decision, he refuses to regard it as a binding precedent on the ground that the rule there announced is applicable to criminal cases only. We have heretofore discussed this supposed distinction and will not pursue it further at this time. Although Judge Wolverton cites the decision of Judge Neterer in this present case (*Sloan Shipyards Corporation vs. United States Shipping Board*, 268 Fed. 624), as an authority it is worthy of remark that, before Judge Wolverton's decision was rendered, Judge Neterer's opinion in the *Sloan* case was cited to this court in the government's brief in the *Strang* case, but this court refused to adopt it.

The reported cases touching the suability of the Fleet Corporation may be divided into three classes, as follows:

*First.* Those cases holding the Fleet Corporation is suable as a distinct corporate identity with respect to all its transactions, whether the cause of action arises in contract or in *tort*. The decision of Judge Hand in the *Gould-Coupler* case, 261 Fed. 716, is typical of this class.

*Second.* Those cases holding the Fleet Corporation is possessed of a sort of dual personality; that is suable with respect to certain transactions when functioning in a corporate capacity, and is immune from suit on other transactions had while functioning as an agency of the government. The decision of Judge Holmes in the *Ingram-Day Lumber Company vs. Fleet Corporation*, 267 Fed. 283, is typical of this class.

*Third.* Within the third class fall the decisions of three district judges of the Ninth district, which broadly hold the Fleet Corporation immune from suit.

The only decisions holding the Fleet Corporation immune from suit in civil actions are those of District Judges Neterer, Wolverton and Bean of the Ninth Circuit. It is but proper to say we have the highest respect for all these judges. We believe these District Judges of the Ninth Circuit have been influenced in their opinions by what they conceived to be the controlling force as a precedent of the case of *Ballaine vs. Alaska Northern Railway Co.*, 59 Fed. 183, decided by the Circuit Court of Appeals of their circuit.

We will first consider some other questions before discussing the *Ballaine case*.

THE DOCTRINE OF GOVERNMENTAL IMMUNITY HAS BUT LITTLE PLACE IN THIS COUNTRY.

To defeat jurisdiction in this case the government is invoking the rule of governmental immunity, which, at best, has little or no place in our system of government. In this country we have no personal sovereign clothed with the royal purple of sovereignty. The rule that the sovereign is immune from suit is but a remnant of the autocratic theory of the feudal ages, that the king can do no wrong. The origin of this rule and its place in our system of government was exhaustively considered by Mr. Justice Miller in the celebrated case of *United States vs. Lee*, 106 U. S. 196, 27 L. Ed. 171. This was an action brought in the courts of Virginia by the heirs of Mrs. Robert E. Lee to recover possession of the Arlington estate seized by federal authorities during the civil war. The action was in form ejectment against certain individuals claiming to hold possession as agents of the United States. The attorney general appeared objecting to the jurisdiction and claiming the action to be in effect one against the United States. It is interesting to note that the so-called motion to dismiss filed by the United States attorney in the case at bar appears

to have been patterned after the corresponding paper filed by the attorney general in *United States vs. Lee*.

Coming to a consideration of the doctrine of governmental immunity, Mr. Justice Miller said:

“What were the reasons which forbade that the King should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges, was the absurdity of of the King’s sending a writ to himself to command the King to appear in the King’s court. No such reason exists in our government, as process runs in the name of the President and may be served on the attorney general \* \* \* nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights, as against the citizens, to their judgment \* \* \*. As we have no person in this government who exercises supreme executive power or performs public duties of a sovereign, it is difficult to say on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts. \* \* \* Notwithstanding the progress which has been made (in England) since the days of the Stuarts, in stripping the Crown of its powers and prerogatives, it remains true today that the monarch is looked

upon with too much reverence to be subjected to the demands of the law, as ordinary persons are, and the King-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure garden by a writ of ejection against the gardener. The Crown remains a fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government \* \* \*. Under our system the *people*, who are there called *subjects*, are the sovereign. The rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives to him, for the protection and enforcement of that right."

Without quoting further from this opinion, it suffices to say that the majority of the court as then constituted, speaking through Mr. Justice Miller, forcibly and even vehemently repel the idea that an agent of the government can grievously wrong the citizen and then hide behind the worn-out rule of governmental immunity. While compelled to recognize the existence of the rule as a matter of precedent, the court nevertheless held that the ex-



emption is limited to suits against the United States, directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States when sued by private persons for property in their possession as such officers and agents. The thought so forcibly expressed by Mr. Justice Miller in the *Lee case* was referred to as the just and proper rule by Judge Hand in the *Gould-Coupler case*, 261 Fed. 716, and by Judge Mayer in the *Sugar Equalization Board case*, 268 Fed. 585. It may be said that there are other decisions of this court which indicate that the doctrine of governmental immunity has not been construed and applied as strictly as Mr. Justice Miller said should be the practice. That, however, is entirely beside the present question. It must be presumed that Congress, when it determined to authorize the creation of the Fleet Corporation to engage in the construction and operation of ships, and, generally, in the transaction of maritime and commercial business, knew that the doctrine of governmental immunity was without any real foundation in our system of government, although as a matter of precedent recognized by the courts., Congress therefore carefully provided that this corporation should be so formed that it would not be as an engine of injustice to the citizen. The attributes of a personal sovereign were expressly denied to it.

WHEN THE WORDS OF A CORPORATE  
CHARTER ARE PLAIN EXTRINSIC  
FACTS WILL NOT BE CONSIDERED AS  
BEARING ON THE MEANING.

The charter of this corporation consists of Section 11 of the Merchant Marine Act of September 7, 1917, the Certificate of Incorporation and the laws of the District of Columbia, which specifically declare that the corporation shall have the power to sue and be sued.

As to the question of suability, the words of this charter are plain. There is no contention that non-suability can be found in the charter, but immunity is sought to be inferred by reference to extrinsic facts. We do not believe there are any extrinsic facts that will support this conclusion, but however that may be, the language of the charter is plain and these extrinsic facts, if any, can not be considered.

In *Ruggles vs. Illinois*, 108 U. S. 536; 27 L. Ed. 812, p. 816, involving the construction of a corporate charter, Chief Justice Waite, quoting from Vattel's *Laws of Nations*, said:

"It is not allowable to interpret what needs no interpretation \* \* \* when a deed is worded in clear and precise terms, when its meaning is

evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it."

Speaking particularly of the corporate charter then under consideration, Chief Justice Waite said: "Here the words are plain and interpret themselves." So, likewise in the case at bar, the words of the Fleet Corporation's charter are plain and interpret themselves. To go elsewhere in search of extrinsic facts from which to imply a restriction which the words themselves do not import is evasion and no interpretation.

Counsel representing the government should state explicitly what their contention is as to the reason why Congress explicitly declared that this corporation should have the power to sue and be sued. Do they concede that Congress acted intelligently and with an honest purpose, or is it their position that Congress acted without intelligence or with a dishonest motive? If Congress was acting both intelligently and honestly, why did it provide that this corporation could sue and be sued if it really meant that it could neither sue nor be sued, or meant that it might bring suits but could not have suits brought against it? If it was the intention to

make this corporation immune Congress could not have acted more unintelligently or crudely than by requiring formation under the laws of the District of Columbia.

## THE POWER TO SUE AND BE SUED AN ESSENTIAL ELEMENT OF CORPORATE EXISTENCE.

The laws of the District of Columbia provide explicitly that this corporation may sue and be sued, but even though these laws did not contain an express declaration to that effect, the corporation would, nevertheless, be suable for the power to sue and be sued is an essential element of corporate existence. If instead of expressly declaring the power to sue and be sued, Congress had merely said: "The members of the Shipping Board and their successors in office shall be a corporation with power to construct and operate ships for use in conducting the domestic and foreign commerce of the United States," such a corporation would have power to bring suits and would be liable to actions brought against it because of its corporate existence.

Abundant authority to sustain this contention will be found cited in our points and authorities *ante*, page 19; and, without discussing them at length, we merely quote from *B. & O. R. R. vs. Harris*, 12 Wall, 65; 20 L. Ed. 354, as follows:

"A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires*

which a natural person could do. The chief point of difference between the natural and the artificial person, is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly."

To say that it was not the purpose to give this corporation power to sue and be sued is but to say that Congress and the Shipping Board intended to bring into existence, not a real corporation, but only the outward form or appearance; in other words, a mere corporate shell. The power to sue cannot be divorced from the power to be sued. The one power is correlative of the other. If the power to be sued is denied, likewise the power to bring suits must also be denied.

## EXCLUSIVE OWNERSHIP OF STOCK BY UNITED STATES DOES NOT CONFER IMMUNITY.

Stock ownership by the United States is urged as a reason why immunity may be implied, as against the express provisions of the charter making this corporation suable. It is too late to press this upon the attention of this court.

In *Bank of U. S. vs. Planters Bank of Georgia*, 9 Wheat. 904; 6 L. Ed. 244, this court disposed of this contention, saying:

“It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never

exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

The rule has been reiterated time and again by this court (*ante*, p. 19). It has been applied to Panama Railway which, in its organization, cannot be distinguished from the Fleet Corporation.

*United States vs. Salus*, 234 Fed. 842, and

*Panama R. R. Co. vs. Curran*, 256 Fed. 772.

This court itself, in *United States vs. Strang*, 254 U. S., p. ....., has declared that the doctrine of the *Planters Bank case* is applicable to and determines the character of the Fleet Corporation.



THE CREATION BY CONGRESS OF A CORPORATION TO FACILITATE THE DISCHARGE OF A GOVERNMENTAL FUNCTION DOES NOT IN ITSELF IMPLY IMMUNITY FROM SUIT.

The main insistence of the government is that the Fleet Corporation was formed as a facility for the discharge of a governmental function and is therefore necessarily immune from suit, although Congress, in the exercise of its own proper powers, saw fit to require it to be formed under the laws of the District of Columbia, which expressly provide that it may sue and be sued. Otherwise stated, the government's contention amounts to this: that every corporation formed by Congress is, of necessity, immune from suit and Congress is without power to otherwise provide. The premise of the government that the Fleet Corporation was formed to discharge a governmental function may be admitted, but the conclusion that it is therefore immune from suit by no means follows. This contention calls for a consideration of the source from whence Congress derives its power to create corporations. The Federal Constitution does not in terms confer that power upon Congress. In the early history of the government the power of Congress to create corpo-

rations was for a long time denied because no express authority to that end was included in the Constitution. The question finally came to this Court in *McCulloch vs. Maryland*, 4 Wheat. 315, in which the doctrine of implied powers was expounded. The case involved the validity of an act of Maryland which undertook to tax the operations of the Baltimore branch of the Old Bank of the United States.

Two principal questions were involved and discussed:

*First.* Does the Federal Government possess the power to create a corporation?

*Second.* If the Federal Government has the power to create a banking corporation, is such a corporation free from state taxation?

Chief Justice Marshall wrote the opinion and held that, while there is no express power delegated to the federal government by the constitution to create a corporation, yet the creation of a banking corporation is a convenient and necessary means for effectuating the purposes of the federal government, and from this it followed that the power to create a corporation is necessarily implied, there being no prohibition in the constitution as to the

means which Congress might employ to discharge the governmental functions.

The court among other things said:

“Among the enumerated powers, we do not find that of establishing a bank or creating a corporation but there is no phrase in the instrument, which, like the articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. \* \* \* If a corporation may be employed indiscriminately with other means to carry into execution the powers of government, no particular reason can be assigned for excluding the use of a bank, if required, for its fiscal operation. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government.”

At another place the court said:

“Although, among the enumerated powers of government, we do not find the word ‘bank’ or ‘incorporation,’ we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war, and to raise and support armies and navies.”

The court concluded that Congress has implied power to create a corporation as a convenient or necessary means of discharging what are designated as the great enumerated powers, and the creation of a banking corporation was approved on the theory that a banking corporation so created is *an instrumentality of the treasury department*. The same

conclusion was reiterated in the case of *Osborne vs. Bank*, 9 Wheat. 708. The corporation involved in the *McCulloch* and *Osborne* cases was the Old Bank of the United States, created by special charter. However, the existence of national banks under the present National Bank Act rests upon the same principle of constitutional law. *Bank vs. Deering*, 91 U. S. 29.

In an unbroken line of authority subsequent to *McCulloch vs. Maryland*, this court has repeatedly stated that a national bank is an instrumentality of the federal government.

In *Davis vs. Elmira Savings Bank*, 161 U. S. 275, Chief Justice White said:

“National banks are instrumentalities of the federal government, created for a public purpose, and as such, necessarily subject to the paramount authority of the United States. \* \* \* These principles are axiomatic and are sanctioned by the repeated adjudications of this court.”

Hence, it is plain that the only authority Congress has to create any corporation arises from the implied power to use all convenient means for exercising one or the other of the great enumerated powers, such as to lay and collect taxes; borrow money; regulate commerce, or declare and conduct war.

In the course of time Congress, as a means of facilitating commerce and providing for the national defense, found it necessary to confer corporate powers and privileges on several of the trans-continental railroad companies. The Union Pacific Railway Company was created by Congress as an instrumentality of interstate commerce and national defense, and on this ground direct financial aid was extended to it by the national government.

*Thomson vs. Union Pacific R. R. Co.*, 9 Wall 759; 19 Law Ed. 792.

*Union Pacific R. R. Co. vs. Peniston*, 18 Wall 5; 21 Law Ed. 787.

*United States vs. Union Pacific Railroad Co.*, 8 Otto 569; 25 Law Ed. 143.

*United States vs. Union Pacific R. R. Co.*, 9 Otto 700; 25 Law Ed. 496.

*Pacific Removal Cases*, 115 U. S. 1; 29 Law Ed. 319.

The Texas & Pacific Railroad Company was chartered by Congress for the same purpose (*Pacific Removal Cases, supra*).

Also the *Central Pacific Railroad Company, California, vs. Central Pacific Railroad Company*, 127 U. S. 1, 32 Law Ed. 150.

In the case last cited this court said:

“It cannot at the present day be doubted

that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations."

In *Luxton vs. North River Bridge Co.*, 153 U. S. 529, 38 Law Ed. 808, this court sustained the validity of a federal corporation created by Congress to build an interstate bridge as a proper exercise of an implied power incidental to the delegated power to regulate commerce. In that case the court said:

“The Congress of the United States being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall: ‘The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.’ Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. *McCulloch vs. Maryland*, 17 U. S. 4 Wheat. 316, 411, 422 (4: 579, 602, 605); *Osborne vs. Bank of United States*, 22 U. S. 9 Wheat. 738, 861, 873 (6: 204, 233, 236); *Union Pac. R. Co. vs. Myers* (‘*Pacific Railroad Removal Cases*’), 115 U. S. 1, 18 (29: 319, 325); *California vs. Central Pac. R. Co.*, 127 U. S. 1, 39 (32: 150, 157). Congress has likewise the pow-

er exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states."

We thus see that the only power Congress has to create any corporation at all is an implied power to do those things necessary or convenient to carry into effect one or the other of the great powers enumerated in the constitution. To say, therefore, that the Fleet Corporation is an arm of the government is only to assert that it is a facility or instrumentality, just as a national bank, an interstate railroad or an interstate bridge company is an instrumentality of the government. If mere federal incorporation for a governmental purpose of itself implies immunity from suit, national banks, federal railroad corporations and federal interstate bridge companies would possess that immunity equally with the Fleet Corporation. The entire history of the country has been otherwise. Up to this time no court has ever decided that a national bank or federal railway or an interstate bridge company is immune from suit merely because it owes its existence to an act of Congress. The authority of Congress to confer corporate powers on railroad companies is implied as incidental to the war power in conjunction with the power to regulate commerce. The implied power



to create the Fleet Corporation is plainly referable to the same enumerated powers.

When Congress saw the necessity of creating this corporation, it could have provided therefor in either of three ways:

First: By creating the corporation by special charter, as was done in the case of the Old Bank of the United States. This method was not adopted.

Second: By passing a general incorporation act like the present national bank act, but Congress saw fit not to adopt this method.

Third: By providing for incorporation under the existing laws of the District of Columbia, which, of course, are federal laws. This method was adopted and Congress must have intended to incorporate into the charter the provisions of the act under which it specifically required the corporation to be formed.

To impute to Congress an intent to make this corporation capable of entering into contract; capable of enforcing such contracts by suit, but at the same time incapable of responding when sued on those very same contracts, is to impute to Congress a purpose to perpetrate the most flagrant dishonesty. If Congress, in the Merchants and Marine act, had expressly said,

“The Fleet Corporation shall be formed; it shall have the power to engage generally in business; it shall have the power to make contracts; it shall have the power to sue on those contracts, but it cannot be made to respond when it breaches its contracts,”

of course no person would enter into business relations with it. Thus the very purpose for which the corporation was formed would have been frustrated. Hence, we must assume that Congress did not expressly confer immunity from suit because it knew that such a provision would entirely destroy the efficacy of this corporation as a means to the desired end. For the courts to now hold that this immunity may vaguely be implied where Congress refrained from granting it expressly, is equivalent to saying that Congress intended to create a trap for the unwary.

If, as the government in effect contends, every corporation created by Congress for the discharge of governmental functions is thereby necessarily immune from suit and Congress is without power to otherwise provide, it seems strange that this most important doctrine has been so long dormant. Practically since the beginning of the government Congress has been forming these corporations for one purpose or another, the power to do so being refer-

able to one or the other of the great powers enumerated in the constitution. The reports are full of cases of all kinds in which these corporations have been sued and not infrequently by the government itself. Generations of the ablest lawyers have been bringing and defending such suits, and generations of the ablest judges have been adjudicating them. If, as the government now contends, corporations of this class are necessarily immune, it seems incredible that some court has not so declared long before this.

The trial court, in his original opinion (Record p. 16) found support for his conclusion in one paragraph taken from the opinion of this court in the *Lake Monroe Case*, 250 U. S. 246, page 254, reading as follows:

“But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers, and subject to definite restrictions, and the Fleet Corporation has been created as an agency, financed with public funds. The emergency shipping legislation evidently employed the Shipping Board and the Fleet Corporation as agencies to exercise the new powers, for the Fleet Corporation was mentioned in the Act and it was known to be but an arm of the Board.”

Separating this paragraph from its context, it is used as seeming authority for this line of reason-

ing: The Fleet Corporation is an arm of the Shipping Board; the Shipping Board is an arm of the government; the government is immune from suit, and therefore the Fleet Corporation is immune from suit.

We respectfully submit that this statement from the *Lake Monroe* decision, considered in its context, is not capable of this construction; for, in that very decision, this court held that when the President elected to use the corporation for the discharge of his war powers, he took it as he found it, with all its powers and all its limitations. Moreover, when, in this excerpt from the *Lake Monroe Case*, the court said that the Fleet Corporation is but an arm of the Shipping Board, it meant nothing different than when it has so frequently said that national banks are instrumentalities of the Treasury Department, or when, as in *Union Pacific Railroad Company vs. Peniston*, 18 Wall 5, 21, Law Edition 787, referring to that railroad, it said:

*"Admitting, then, fully, as we do, that the Company is an agent of the Federal Government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, it does not necessarily follow that its property is exempt from state taxation."*

The analogy between national banks as agencies

of the Treasury Department and the Fleet Corporation as an agency of commerce and national defense was urged upon the attention of the trial court on the second argument in this case. In answer, the trial judge, second opinion (Record, p. 20), said:

“The analogy urged by the plaintiff with the suability of a national bank is without force, because, by express congressional provision in the National Bank Act, the unlimited right to sue and be sued is given.”

True, the National Bank Act expressly provides that national banks may sue and be sued, but with equal emphasis the incorporation laws of the District of Columbia declare that the Fleet Corporation may sue and be sued. The express provision of the one statute is neither more nor less emphatic than the corresponding provision of the other.

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IF THE FLEET CORPORATION IS A DISTINCT ENTITY AND SUABLE AS A PRIVATE CORPORATION, THE JURISDICTION OF SUITS AGAINST IT IS NOT LODGED EXCLUSIVELY WITH THE COURTS OF THE DISTRICT OF COLUMBIA.

In his original opinion (Record, pp. 15-18) sustaining the motion to dismiss, Judge Neterer placed his decision squarely on the proposition that the corporate existence of the Fleet Corporation is so completely merged in that of the United States as a sovereign that a suit against the one is, in effect, a suit against the other. This decision, as we have before remarked, was rendered before the decision of this court in *United States vs. Strang*, 254 U. S., p. —. In his second opinion following the *Strang* decision (Record, pp. 19, 20), Judge Neterer, though reaffirming his original view, then placed his decision on an alternative ground, namely, that the Fleet Corporation exists under the laws of the District of Columbia, which provide that it shall "be capable of suing and being sued in any court of law or equity in the *District*." From this he concluded (Record, p. 20) that it was immaterial, for the purposes of the motion before him, whether the view

previously expressed was or was not correct, for, as he said, "the suability, if not immune from suit, is definitely fixed before the court in the District of Columbia." No authority is cited to sustain this alternative ground; and the fact is that the conclusion so expressed is in direct conflict with the *Bankers Trust Company vs. Texas & Pacific Railway Company*, 241 U. S. 295; 60 L. Ed. 1010. This was a suit to foreclose a mortgage given by the Texas & Pacific Railway Company, a corporation, created by an act of Congress which provided that the company "by that name \* \* \* shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all the courts of law and equity within the United States." By reason of this provision of the statute of its creation, it was contended that this Federal Railway Company was suable only in the courts of the United States. In rejecting this limitation upon its suability, this court said:

"Upon reading Section 1 of the Act of 1871, it is plain that the words 'by that name \* \* \* shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all the courts of law and equity within the United States,' were not intended in themselves to confer jurisdiction upon any court. As the context shows, Congress was not then concerned with the jurisdiction of courts but with the faculties and powers of the corporation which it was cre-

ating; and evidently all that was intended was to render this corporation capable of suing and of being sued by its corporate name in any court of law or equity—Federal, State, or Territorial—whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suits, the amount in controversy, and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words.”

So, with respect to the Fleet Corporation, the qualifying phrase “in the District” was never intended to define or limit the jurisdiction of the courts. That phrase is but part of the provision of the statute expressly conferring upon the corporate entity the attribute characteristic of corporate existence, namely, the power to sue and be sued. A corporation formed under that statute has capacity to sue and be sued in its domicile, and when it migrates, so to speak, from its domicile and does business in other jurisdictions, it carries with it all the powers and attributes it possesses at home, and is capable of suing and being sued in its corporate name in any court of law or equity, Federal, State or Territorial, whose jurisdiction is otherwise competently defined.

In other words, the Fleet Corporation having



power to sue and be sued "in the District," is no different than a corporation of New Jersey, for instance, which, being suable at home, is also suable wherever else it may establish itself to do business.

By reason of its incorporation under the laws of the District of Columbia, which are, of course, Federal laws, suits against the Fleet Corporation are suits arising under the laws of the United States, and if the requisite amount be involved such suits may be brought in the District courts of the United States throughout the country, for the judiciary act specifically confers upon these district courts jurisdiction over suits arising under the laws of the United States.

We, therefore, respectfully contend that the decree of dismissal cannot be sustained on the alternative ground upon which the trial court places it.

BALLAINE vs. ALASKA NORTHERN RAIL-  
WAY CO., 259 Fed. 183.

This is the only reported case, we believe, holding that a corporation created by Congress, or in which the United States is the controlling stockholder, is immune from suit; and, as heretofore stated, this decision appears to be the real foundation for the application of that doctrine by the District Judges of the Ninth Circuit to suits against the Fleet Corporation. This decision, we submit, is either wrong in principle or it turns on facts peculiar to itself and entirely dissimilar from those of the case at bar. For a clear understanding of the facts, reference should be made to the report as contained in 5 Alaska Reports 694, as well as that of the Circuit Court of Appeals (259 Fed. 183).

On March 12, 1914, Congress passed an act authorizing the President to locate, construct and operate railways in Alaska.

On April 6, 1915, the Secretary of the Interior, acting for the President, entered into an agreement with certain officers and agents of the Alaska Northern Railway Company, whereby the United States acquired all the stocks, bonds and assets of that corporation, except certain claims of the railway com-

pany against third parties relating to the townsite of Seward. Ballaine and his brother were evidently among the persons against whom these supposed claims existed. These claims were expressly excluded from the purchase made on behalf of the United States.

On April 29, 1915, the prior owners of the Alaska Northern Railway Company, using the corporation as a nominal plaintiff, brought action against Ballaine to establish the rights in the Seward townsite reserved in the contract of sale to the United States.

On September 21, 1915, before the trial of the action, the Secretary of the Interior, in response to an inquiry from Ballaine, advised him that the United States were in no way interested in the litigation, but that the rights to the proceeds of the litigation had been expressly reserved to the "Canadian Bondholders" who made the sale to the United States.

On November 1, 1915, the case was tried in the Alaska Court and resulted favorably to Ballaine, who was personally present at the trial and knew all the facts relative to the transaction.

On June 24, 1916, Ballaine brought an action

against the Alaska Northern Railway Company to recover damages in the sum of \$150,000.00 on the ground that the townsite litigation was instituted maliciously and without probable cause.

On October 23, 1916, the United States, by leave of court, intervened in the damage action, setting up the terms and conditions of the sale; that the townsite litigation had been prosecuted wholly in behalf of the former owners; that the United States had paid in full for the stocks, bonds, and railway assets, and that the road was then held and controlled in behalf of the United States.

Ballaine demurred to the intervening complaint and the demurrer was overruled (5 Alaska Report 694).

Apparently, then, Ballaine answered, setting up some affirmative matters, whereupon the United States demurred to Ballaine's answer (259 Fed. 183) and that demurrer was sustained and the action dismissed.

The particular case before the Court was that of Frank L. Ballaine for \$150,000, but from report of case as stated by District Judge Brown of Alaska it appears that John E. Ballaine brought a companion suit upon the same ground for \$300,000. The dis-

missal of the action was ordered by the trial court and sustained by the Circuit Court of Appeals, on the theory that the action against the Railway Company was one sounding in *tort*; that the real party defending was the United States, and that therefore there was no jurisdiction to proceed.

The first thing that strikes the reader is that the claims of the Ballaines for \$450,000 damages for the mere prosecution of an ordinary civil suit in which, on the trial, they prevailed, are so fanciful that any court would strain a point to terminate the action quickly, when it seems to have been a matter of common knowledge, as indicated by District Judge Brown in his opinion, that the land in question was of little or no value until the United States had acquired the railway property. It is not improbable that, unconsciously or otherwise, this was the real consideration that brought about, or influenced, the dismissal of the action. (See later suit against bondholders in which after trial on merits Court of Appeals held Ballaine had sustained no recoverable damage. *Bolland vs. Ballaine*, 266 Fed. 22.) The ground upon which the dismissal was placed, however, was that the action, in effect, was one to obtain a judgment and satisfy that judgment out of property which had passed to the United States in its

sovereign capacity. The issue seems to have been presented to the Circuit Court of Appeals upon these opposing contentions as to the facts relative to the operation of the Alaska Northern Railway Company after the United States had secured control:

Ballaine contended that the railway property had been acquired by the United States as a purely commercial venture.

On the other hand, the United States contended that the property had been acquired solely for governmental and public uses.

It apparently was assumed by the court and counsel that if the latter view was correct as to the fact, the dismissal was properly ordered. Adopting the view of the facts contended for by the government, the Circuit Court of Appeals sustained the dismissal.

We think we have already demonstrated, in a preceding portion of this brief, that the mere incorporation of a railway company by Congress for governmental and public uses does not imply immunity from suit. The very cases cited by the Circuit Court of Appeals to sustain the constitutional power of Congress to construct or acquire railroads for public purposes suggest, if they do not hold, that such cor-

porations, when brought into existence, are suable. For instance, the Circuit Court of Appeals cites the case of *California vs. Central Pacific Railway Company*, 127 U. S. 1, 32 Law Ed. 150. By reference to that decision it will be seen that that was an action in which the state of California sued the Central Pacific Railway Company, a federal corporation. If that corporation, being formed for a federal purpose, was not suable at all, how does it happen that the case ever reached a decision on the merits?

Two other cases cited by the Circuit Court of Appeals, and upon which it bases its decisions, namely, *Murray vs. Wilson Distilling Co.*, 213 U. S. 151 and 53 Law Ed. 743; and *Cunningham vs. Macon & New Brunswick R. R. Co.*, 141 U. S. 446, 27 Law Ed. 992, plainly are not in point at all, for neither of those decisions have any relation whatever to the question whether a corporation created by Congress, or in which the United States has the controlling ownership, is suable or immune from suit.

The *Murray Case* was simply an action brought against certain state officials of the state of South Carolina in their official capacity to control a fund which the court found to be, in fact, the money of the state of South Carolina in its sovereign capacity. Of course this was a suit against the state and not

within the cognizance of the Federal Courts, by reason of the prohibition of the 11th Amendment.

The *Cunningham Case* was an action brought to foreclose a mortgage on railroad property. The legal title and actual possession was vested in the state of Georgia directly, and not indirectly through a corporation in which it held stock. The Court held that, under these circumstances, the state being an indispensable party, a Federal Court could not exercise jurisdiction, because of the prohibition of the 11th Amendment.

We think it quite plain that the decision of the Circuit Court of Appeals of the Ninth Circuit in the *Ballaine Case* is not sustained by the decisions cited by that court, nor can it be sustained by any decisions that can be produced. Moreover, the Court dismissed the action because it assumed in advance that the plaintiff, if he obtained judgment, would undertake to levy execution against certain property which could not be subjected to the judgment because of the interest of the United States in that property. We think this was not a good reason for dismissing the suit. What steps the plaintiff might take to satisfy a judgment, if he got one, could not be known, as a matter of law, until after the judgment had been rendered. If, then, the plaintiff



should attempt to wrongfully levy execution on property not subject to execution, that would seem to be time enough for the United States to raise the question. The fact that there might be no property subject to execution to satisfy the judgment was not a sufficient reason for the court refusing to permit a trial on the merits if otherwise the plaintiff was entitled to such a trial.

The *Ballaine* decision is not in harmony with prior cases. Since its rendition it has been cited several times to federal judges and, with the exception of the District Judges of the Ninth Circuit, no judge has followed it.

Judge Dickenson (261 Fed. 443) and Judge Call (269 Fed. 320) find the *Ballaine Case* in conflict with *Solas vs. U. S.*, 234 Fed. 842, and follow the latter.

Judge Ervin (266 Fed. 751) and Judge Holmes (267 Fed. 293) cite the *Ballaine Case* but follow the contrary decisions of Judges Dickenson and Hand.

Judge Mayer (268 Fed. 585) says that if the *Ballaine* decision is to be deemed an authority at all it must be on the special facts of the case, and declines to follow it.

THE DISTRICT COURT HAD JURISDICTION  
IN THIS PARTICULAR CASE EVEN  
THOUGH IT LACKS JURISDICTION  
GENERALLY IN SUITS AGAINST THE  
FLEET CORPORATION.

We have heretofore pointed out that this particular litigation has its origin in a contract between the Sloan Shipyards Corporation and the Fleet Corporation for the construction of sixteen wood merchant vessels made at a time when the Fleet Corporation was endowed only with the strictly corporate powers of a business corporation. The contract does not purport to have been made in any other capacity, and indeed, it could not have been at that time. The United States as such are not mentioned in the contract for the very good reason, no doubt, that the persons there acting on behalf of the Fleet Corporation well knew they had no authority to make a contract on behalf of the United States and had not the slightest intention of doing so. They acted for the corporation and for the corporation alone. As stated by this Court in its decision in the *Strang Case*, 254 U. S. — :

“The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. \* \* \* They were subject to re-

removal by the corporation only and could contract only for it. \* \* \* They were not agents of the United States."

It is true that the original contract of May 18th, 1917, was modified by the Supplemental Agreement of May 1st, 1918, subsequent to the President's executive order. It is also true that in the introductory clause of this agreement the party who drafted it described the Fleet Corporation as a corporation organized under the laws of the District of Columbia, representing the United States of America. But this phrase "representing the United States of America," means nothing as a matter of law. These are but words of description and misdescription at that. The supplemental contract like the original contract was executed by the Fleet Corporation in its own corporate name, by its own vice-president. There was no legislation authorizing the Fleet Corporation to hold itself out as representing the United States of America as such. The officer of the corporation who executed the supplemental contract was not an officer or agent of the United States authorized to make contracts for it, but only an officer appointed by the corporation, subject to removal by the corporation, with power to contract only for the corporation, as stated in the *Strang* decision, which, by the way, makes no distinction

between officers of the Fleet Corporation functioning as such prior to the President's executive order and the same officers functioning subsequent thereto. Even though the contract of May 1st, 1918, had completely superseded and abrogated the prior contract of May 18, 1917, there would be little or no ground to claim that the subsequent contract was that of the United States and not that of the Fleet Corporation. However, there is not even this weak peg upon which to hang an argument, for the contract of May 1st, 1918, does not purport to abrogate the prior contract of May 18th, 1917. It plainly states in paragraph 8 (Record, page 47) that

“The shipbuilding contract (that is, the contract of May 18th, 1917) is modified only as provided in this agreement, but otherwise remains in full force and effect and the provisions thereof except where clearly inapplicable, apply to the terms of this agreement.”

“All the provisions of this contract \* \* \* shall be deemed to have taken effect as of the — day of November, 1917, which date is intended to be the date upon which the owner first assumed supervision and control over the accounting and management of the contractor.”

It must be manifest that the two agreements taken together must be one thing or the other. The contract, in its inception, was the agreement of the Fleet Corporation made within its strictly charter

powers as a business corporation. It never became anything else for the simple reason that no one had authority to make it anything else. It never became the contract of the United States because no officer of the United States having power to contract on behalf of the United States had anything to do with it. As stated by the Appellate Division of the Supreme Court of New York in *Ingersoll Rand Company vs. Fleet Corporation*, 187 N. Y. S. 695, the contract in its final form was well within the original charter powers of the Fleet Corporation. This action, which in its main feature is one for an accounting under this contract, is well within the jurisdiction of the District Court, even though the jurisdiction might be debatable as regards contracts made subsequent to the executive order of July 11th, 1917.

Plainly, if a suit should be brought on this contract in the Court of Claims, it would be summarily dismissed, for there is no theory whatever on which it can be claimed that this particular contract is that of the United States.

## LAKE MONROE CASE, 250 U. S. 246.

In view of what has already been said throughout this brief, it does not seem necessary to discuss the *Lake Monroe Case* at any great length. Nothing that we could say would add to what has been so well said concerning this decision by Judge Hand in *Gould Coupler Co. vs. Fleet Corporation*, 261 Federal 716. As Judge Hand read this decision, this Court there held that when the President by his executive order of July 11th, 1917, selected the Fleet Corporation as an agency to perform certain of the war powers conferred on him by the Act of June 15th, 1917, he took the corporation as he found it, with all its corporate powers and all the limitations of its charter. Reading the decision as a whole, it does not appear to be reasonably susceptible of any other interpretation.

APPROPRIATION ACT OF OCTOBER  
6TH, 1917.

Judge Neterer, in his first decision (Record, page 16), apparently attached some importance to the Act of October 6th, 1917 (40 Stats. 345), prohibiting the transfer of employees from one executive department to another, or to independent establishments or *vice versa*, and providing that for the purpose of the particular section of the Fleet Corporation should be considered a government establishment. This legislation was passed nearly a year after the Merchants Marine Act of September 7th, 1916, and is merely a rider in an appropriation bill dealing with distribution of government clerks. It is not conceivable that Congress, in this vague way, ever intended to either add to or subtract from the substantive powers and privileges of the corporation directed to be formed by the Act of the prior year. If Congress had intended to substantially change the nature of the corporation, it must be assumed that it would have done so by amending the act providing for its creation and would not have resorted to an indirect way of accomplishing that purpose by inserting in an appropriation bill a provision dealing with the distribution of government

clerks. If this provision of the Act of October 6th, 1917, has any significance at all, it is rather the other way; for, when Congress declared that for this one single purpose the Fleet Corporation should be considered a government establishment, it impliedly recognized that for all other purposes it is not a government establishment. This is the view this Court took in the *Strang Case*, 254 U. S. —.

We realize that this court has frequently said that debates in Congress are of doubtful value in determining the meaning of the statute. However, we print as an appendix to this brief for such consideration as the Court may think proper, excerpts from the Congressional Record relative to the creation of the Fleet Corporation, and also an excerpt from the report of the "Walsh Committee," which, under resolution of the House of Representatives, investigated shipping board operations.

It is respectfully submitted that the decree of the trial court dismissing this action for want of jurisdiction is erroneous.

EVAN S. McCORD,  
STEPHEN V. CAREY,  
*Solicitors for Appellants.*

(Italics in this brief are ours.)



## APPENDIX.

"The government ownership feature of this bill is limited. The possibility of government operation under the pending measure bears the same relation to the balance of the Bill that a single grain of cockle would bear to a full measure of wheat."

Representative Sanders of Virginia.

Congressional Record, p. 8103, May 16th, 1916.

"Granting for the sake of argument, that government ownership of vessels is objectionable, yet if there is any feature in this Bill, any feature of government ownership, it contains in itself the means for the automatic elimination of all government ownership."

Representative Burke of Wisconsin.

Congressional Record, p. 8091, May 16th, 1916.

"Its sole aim and enterprise is to provide the country with shipping facilities absolutely necessary to carry on its commerce with other nations of the world."

Representative Lazaro of Louisiana.

Congressional Record, p. 8103, May 16, 1916.

"This is not a political question—this is a great business proposition which any man who has any products to ship to foreign countries is interested in."

Representative Miller of Pennsylvania.

Congressional Record, p. 8071, May 16, 1916.

"Another provision that they (the minority) did not approve was that in reference to

the government operation of ships. \* \* \* If you look at Section 11 of the Bill, you will see that it provides that after five years the operation of ships under the corporation in which the government may own a majority of the stock, shall cease. That concession was made to those who opposed permanent government operation of ships. We further provided that these foreign-built ships, and ships operated by a corporation in which the government is the owner of stock, may not be used in coastwise trade. \* \* \* As we wished to demonstrate that we have no intention to discourage private capital from investing in shipping for fear of competition by the government controlled lines, we wrote that provision in the Bill."

Representative Alexander.

Congressional Record, p. 8079, May 16th, 1916.

Not only was the bill advocated because it was a business proposition, but it was even opposed for the same reason.

"I shall vote against this Bill because the sole argument in its favor is that it is necessary to create a great merchant fleet \* \* \* to be run as a government trading venture."

Representative Siegel of New York.

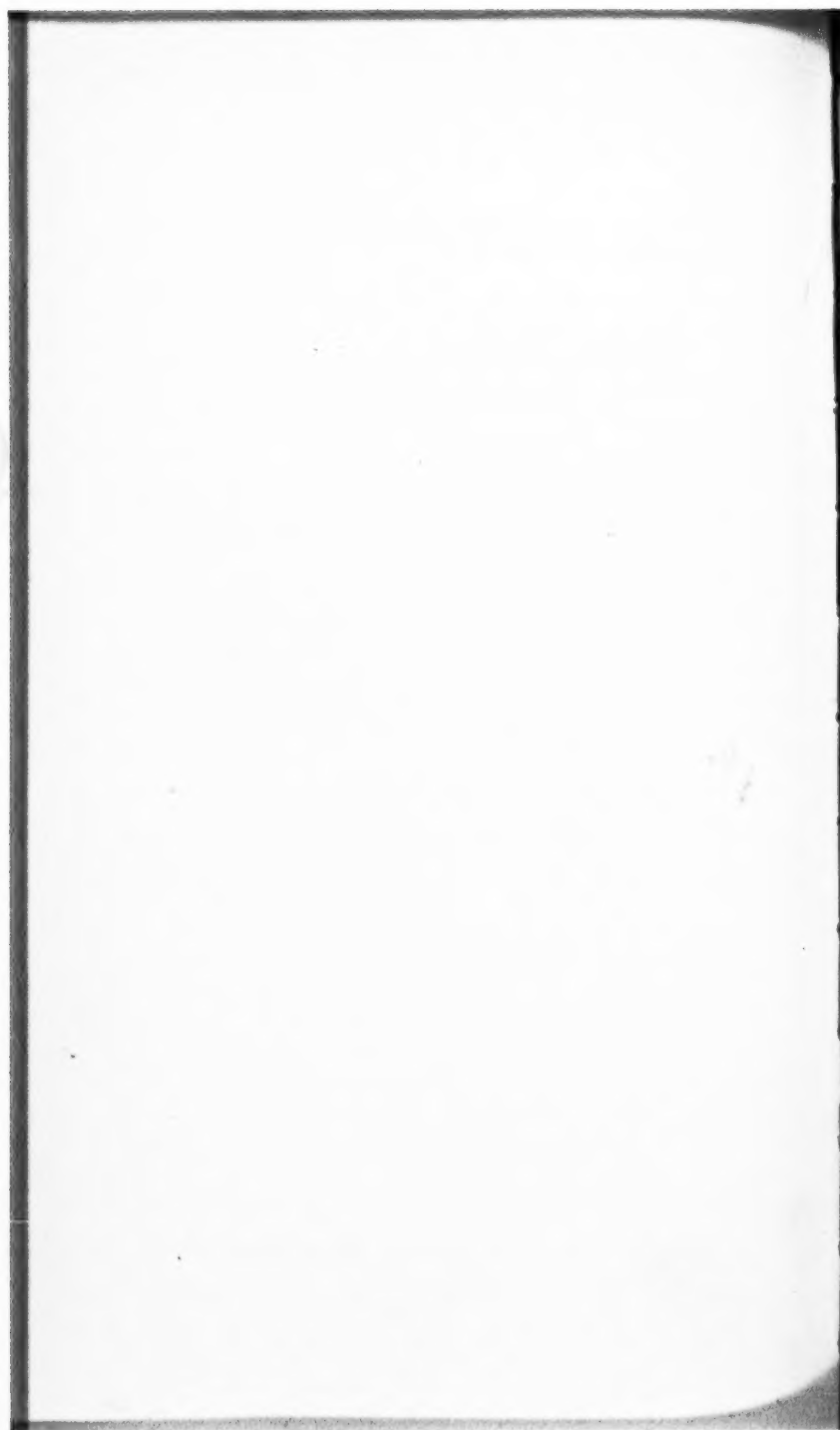
Congressional Record, appendix 999, May 16th, 1916.

The chief powers of the board were exerted, however, through the instrumentality of the United States Shipping Board Emergency Fleet Corpora-

tion, the details of which organization were as follows:

“The Board was authorized by the Shipping Act to form with a capital stock not exceeding \$50,000,000 one or more corporations for the ‘purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels for the commerce of the United States.’ The purpose of this authorization was to place on a competitive equality with private shipping, vessels operated under government appropriations, by exempting the latter on the one hand from governmental restrictions not adapted to commercial practices, and by withholding from them on the other hand such special immunity in domestic or international law as is customarily associated with governmental activity.”

Walsh Committee Report, House of Representatives, No. 1399, 66th Congress, Third Session, pages 3-4.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921: Nos. 308, 376, 526

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EXTRACTS FROM  
STATUTES, EXECUTIVE ORDERS  
AND OTHER DOCUMENTS

RELATING TO

THE UNITED STATES SHIPPING BOARD  
EMERGENCY FLEET CORPORATION

FOR USE IN

SLOAN SHIPYARDS CORPORATION,  
ASTORIA MARINE IRON WORKS,  
AND EASTERN SHORE SHIPBUILD-  
ING CORPORATION CASES

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SUBMITTED WITH GOVERNMENT'S BRIEF



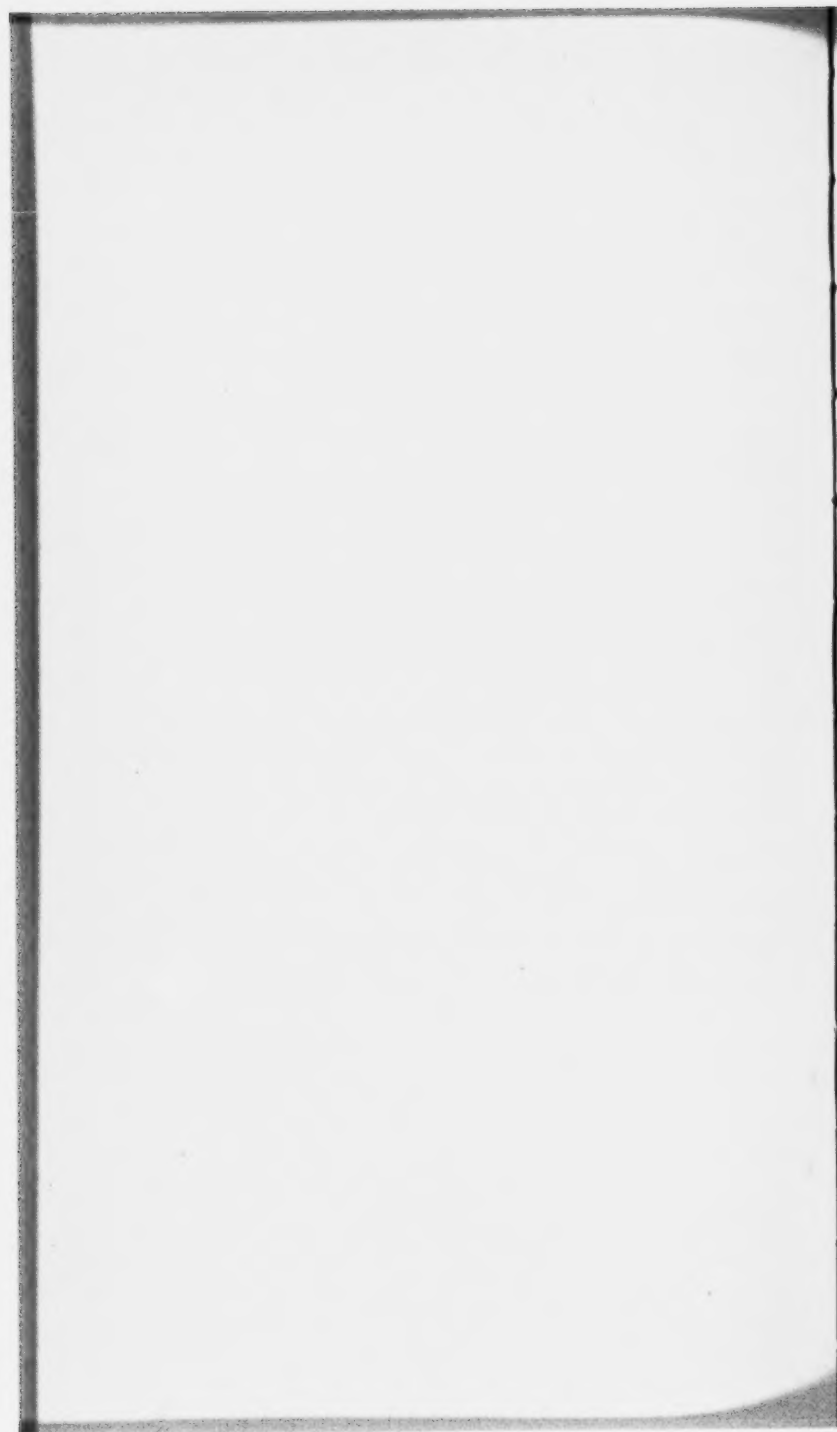
WASHINGTON  
GOVERNMENT PRINTING OFFICE

1922



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## SHIPPING ACT, 1916.

[Act of Sept. 7, 1916: 39 Stat. 728.]

SEC. 3. That a board is hereby created, to be known as the United States Shipping Board, and hereinafter referred to as the board. The board shall be composed of five commissioners, to be appointed by the President, by and with the advice and consent of the Senate;

\* \* \*

SEC. 5. That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels: *Provided*, That neither the board nor any corporation formed under section eleven in which the United States is then a stockholder shall purchase, lease, or charter any vessel—

(a) Which is then engaged in the foreign or domestic commerce of the United States, unless it is about to be withdrawn from such commerce without any intention on the part of the owner to return it thereto within a reasonable time;

(b) Which is under the registry or flag of a foreign country which is then engaged in war;

(c) Which is not adapted, or can not by reasonable alterations and repairs be adapted, to the purposes specified in this section;

(d) Which, upon expert examination made under the direction of the board, a written report of such examination being filed as a public record, is not without alteration or repair found to be at least seventy-five per centum as efficient as at the time it was originally put in commission as a seaworthy vessel.

\* \* \* \* \*

SEC. 9. That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered or enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States,

as provided in this act, may engage in the coastwise trade of the United States.

Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased.

When the United States is at war, or during any national emergency, the existence of which is declared by proclamation of the President [the proclamation by the President of a national emergency as provided herein was made Feb. 5, 1917. The text of the proclamation is reprinted on p. 27], no vessel registered or enrolled and licensed under the laws of the United States shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry or flag, unless such vessel is first tendered to the board at a price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section 10.

Any vessel sold, chartered, leased, transferred, or operated in violation of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000 or to imprisonment of not more than five years, or both such fine and imprisonment.

\* \* \* \* \*

SEC. 11. That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: *Provided*, That no corporation in which the United States is a stock-

holder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board.

The board shall give public notice of the fact that vessels are offered and the terms and conditions upon which a contract will be made, and shall invite competitive offerings. In the event the board shall, after full compliance with the terms of this proviso, determine that it is unable to enter into a contract with such private parties for the purchase, lease, or charter of such vessel, it shall make a full report to the President, who shall examine such report, and if he shall approve the same he shall make an order declaring that the conditions have been found to exist which justify the operation of such vessel by a corporation formed under the provisions of this section.

At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section seven and shall dispose of the property other than vessels on the best available terms and, after payment of all debts and obligations, deposit the proceeds thereof in the Treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten.

\*     \*     \*     \*     \*

SEC. 13. That for the purpose of carrying out the provisions of sections five and eleven no liability shall be incurred exceeding a total of \$50,000,000 and the Secretary of the Treasury, upon the request of the board, approved by the President, shall from time to time issue and sell or use any of the bonds of the United States now available in the Treasury under the acts of August fifth, nineteen hundred and nine, February fourth, nineteen hundred and ten, and March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed \$50,000,000: *Provided*, That any bonds issued and sold or used under the provisions of this section may be made payable at such time within fifty years after issue as the Secretary of the Treasury may fix, instead of fifty years after the date of issue, as prescribed in the act of August fifth, nineteen hundred and nine.

The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the Treasury to the credit of the board, and are hereby permanently appropriated for the purpose of carrying out the provisions of sections five and eleven.

\* \* \* \* \*

#### DISTRICT OF COLUMBIA CODE.

[Act of March 3, 1901; 31 Stat., 1189, 1284.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That the following is hereby enacted and declared to be a code of law for the District of Columbia \* \* \* :

SEC. 605. CERTIFICATE.—Any three or more persons who desire to form a company for the purpose of carrying on any enterprise or business which may be lawfully conducted by an individual, excepting banks of circulation or discount, railroads, and such other enterprise or business as may be otherwise specially provided for in this code, may make, sign, and acknowledge, before some officer competent to take the acknowledgment of deeds, and file in the office of the recorder of deeds, a certificate in writing: *Provided*, That nothing herein contained shall be held to authorize the organization of corporations to buy, sell, or deal in real estate, except corporations to transact the business ordinarily carried on by real estate agents or brokers.

SEC. 606. In such certificate shall be stated—

First. The corporate name of the company and the object for which it is formed. \* \* \*

SEC. 607. SIGNERS INCORPORATED.—When the certificate shall have been filed, in accordance with the provisions of the preceding section, the persons who shall have signed and acknowledged the same, and their successors shall be a body politic and corporate in fact and in name, by the name stated in such certificate, and by that name have succession and be capable of suing and being sued in any court of law or equity in the District. \* \* \*

#### EMERGENCY FLEET CORPORATION'S CERTIFICATE OF INCORPORATION.

[April 16, 1917.]

KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, a majority of whom are residents of the District of Columbia, desiring to form a corporation under subchapter four (4) of the incorporation laws of the District of Columbia, and in pursuance of section eleven (11) of an act of Congress entitled "An act to establish

a United States Shipping Board," approved September 7, 1916, do hereby certify:

*First.* That the corporate name of this company shall be United States Shipping Board Emergency Fleet Corporation, and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business, as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said subchapter four (4) of the incorporation laws of the District of Columbia.

*Second.* That the existence of this corporation shall be perpetual.

*Third.* That the capital stock of this corporation shall be fifty million dollars (\$50,000,000), divided into shares of the par value of one hundred dollars (\$100) each. \* \* \*

#### URGENT DEFICIENCIES APPROPRIATIONS ACT.

[Act of June 15, 1917; 40 Stat. 182.]

(Words in square brackets [ ] were added by act of April 22, 1918; 40 Stat. 535. Words in *italics* were added by act of November 4, 1918; 40 Stat. 1022. Words with rule run through them were stricken out by act of November 4, 1918; 40 Stat. 1022.)

#### EMERGENCY SHIPPING FUND.

The President is hereby authorized and empowered, within the limits of the amount herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind, and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material [or take possession, lease, or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation].

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) *To acquire, construct, establish, or extend any plant, and, in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interests therein; and* To requisition and take over for use or operation by the United

States any plant, or any part thereof, without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

[(f) To take possession of, lease, or assume control of, or to *extend, improve, or increase, or cause to be extended, improved, or increased,* any street railroad, interurban railroad, or part thereof, wherever operated, and all cars, appurtenances, and franchises or parts thereof commonly used in connection with the operation thereof necessary for the transfer and transportation of employees of shipyards or plants engaged, or that may hereafter be engaged, in the construction of ships or equipment therefor for the United States.]

(g) *In pursuance of the foregoing powers, or any of them, to make advance payments or loans of such amounts and upon such terms as the President may deem necessary and proper.*

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such orders shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

\* \* \*

The word "plant" shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard, *dry dock, marine railway, pier, or dockyard and discharging terminal or other facilities connected therewith, and any facilities or improvements connected with any of the foregoing descriptions of property.*"

---

**EXECUTIVE ORDER OF JULY 11, 1917, No. 2664.**

[Repealed June 5, 1920. See section 1, merchant marine act, 1920.]

By virtue of authority vested in me in the section entitled "Emergency shipping fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen,

and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE,  
11 July, 1917.

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#### FLEET CORPORATION'S REQUISITION ORDER OF AUGUST 3, 1917.

By virtue of an act of Congress, approved June 15, 1917, entitled "An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes" and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive Order of the President, dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons D. W. capacity, under construction in your yard and certain materials, machinery, equipment, outfit and commitments for materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all sup-



plemental agreements in relation thereto and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this Corporation.

W. L. CAPPS,

*General Manager, United States Shipping Board  
Emergency Fleet Corporation.*

WASHINGTON, D. C., August 3, 1917.

#### SHIPPING BOARD'S REQUISITION ORDER OF OCTOBER 12, 1917.

UNITED STATES SHIPPING BOARD,

*Washington, October 12, 1917.*

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon.

1. The ships affected by said requisition and included therein are:

(a) All cargo ships able to carry not less than 2,500 tons total deadweight, including bunkers, water, and stores.

(b) All passenger steamers of not less than 2,500 tons gross register.

2. (a) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inward cargo and ship is put in ordinary good condition.

(b) As to steamers which have started to load their outward cargo, requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports, that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (a) Owners, whose steamers are operating in their regular trades, are to continue the operation of their steamers for account of the Government, as they have been doing for themselves, until they receive further instructions.

(b) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers.

BAINBRIDGE COLBY, *Commissioner.*



## HOUSING LAW OF MARCH 1, 1918.

[40 Stat., 438.]

[Repealed, June 5, 1920. See section 16, merchant marine act, 1920.]

CHAP. 19.—An Act To authorize and empower the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire, and to sell or otherwise dispose of improved or unimproved land, houses, buildings, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States Shipping Board Emergency Fleet Corporation is hereby authorized and empowered within the limits of the amounts herein authorized—

(a) To purchase, lease, requisition, including the requisition of the temporary use of, or acquire by condemnation or otherwise any improved or unimproved land or any interest therein suitable for the construction thereon of houses for the use of employees and the families of employees of shipyards in which ships are being constructed for the United States.

(b) To construct on such land for the use of such employees and their families houses and all other necessary or convenient facilities upon such conditions and at such price as may be determined by it, and to sell, lease, or exchange such houses, land, and facilities upon such terms and conditions as it may determine.

(c) To purchase, lease, requisition, including the requisition of the temporary use of, or acquire, by condemnation or otherwise any houses or other buildings for the use of such employees and their families, together with the land on which the same are erected, or any interest therein, all necessary and proper fixtures and furnishings therefor, and all necessary and convenient facilities incidental thereto; to manage, repair, sell, lease, or exchange such lands, houses, buildings, fixtures, furnishings and facilities upon such terms and conditions as it may determine to carry out the purposes of this act.

(d) To make loans to persons, firms, or corporations in such manner, upon such terms and security, and for such time not exceeding ten years, as it may determine to provide houses and facilities for the employees and the families of employees of such shipyards.

Whenever said United States Shipping Board Emergency Fleet Corporation shall acquire by requisition or condemnation such property or any interest therein, it shall determine and make compensation therefor, and if the amount thereof so determined is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as added to such seventy-five per centum will make such an amount as will be just compensation for the property or interest therein so taken, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

That whenever the said United States Shipping Board Emergency Fleet Corporation shall requisition any property or rights, or upon the filing of a petition for condemnation hereunder, immediate possession may be taken by it of such land, houses, or other property, rights, and facilities to the extent of the interests to be acquired therein, and the same may be immediately occupied and used, and the provisions of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended as to all land acquired hereunder.

The power to acquire property by purchase, lease, requisition, or condemnation, or to construct houses or other buildings, and to make loans, or otherwise extend aid as herein granted shall cease with the termination of the present war with Germany. The date of the conclusion of the war shall be declared by proclamation of the President.

The word "person" used herein shall include a trustee, firm, or corporation. The word "shipyard" shall include any factory, workshop, warehouse, engine works, buildings, or grounds used for manufacturing, assembling, construction, or other process in shipyards and dockyards and discharging terminals, and other facilities connected therewith, now or hereafter used in connection with shipbuilding.

That for the purpose of carrying out the provisions of this act the expenditure of \$50,000,000 is hereby authorized, and in executing the authority granted by this act the said United States Shipping Board Emergency Fleet Corporation shall not expend or obligate the United States to expend more than the said sum, nor shall any contract for construction be entered into which provides that the compensation of the contractor shall be the cost of construction plus a percentage thereof for profit, unless such contract shall also fix the reasonable cost of such construction as determined by the United States Shipping Board Emergency Fleet Corporation and provide that upon any increase in cost above the reasonable cost so fixed by such board the percentage of profit shall decrease as the cost increases in accordance with a rate to be fixed by said board and expressed in the contract. No contract shall be let without the approval of the United States Shipping Board Emergency Fleet Corporation: *Provided, however,* That nothing herein contained shall be construed to prevent said board from contracting for the payment of premiums or bonuses for the speedy completion of the work contracted for: *Provided further,* That the United States Shipping Board Emergency Fleet Corporation shall report to Congress on the first Monday in December of each year the names of all persons or corporations with whom it has made contracts and of such subcontractors as may be employed in furtherance of this act, including a statement of the

purposes and amounts thereof, together with a detailed statement of all expenditures by contract or otherwise for land, buildings, material, labor, salaries, commissions, demurrage, or other charges in excess of \$10,000.

Approved, March 1, 1918.

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**ACT OF APRIL 22, 1918, AMENDING EMERGENCY SHIPPING FUND ACT.**

[40 Stat. 535.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section one of the emergency shipping fund provisions of the urgent deficiency appropriation act of June fifteenth, nineteen hundred and seventeen, is hereby amended by adding a new provision reading as follows:

"(f) To take possession of, lease or assume control of, any street railroad, interurban railroad, or part thereof wherever operated, and all cars, appurtenances, and franchises or parts thereof commonly used in connection with the operation thereof necessary for the transfer and transportation of employees of shipyards or plants engaged or that may hereafter be engaged in the construction of ships or equipment therefor for the United States."

SEC. 2. That paragraph (b) of section one of said act is hereby amended by adding, after the word "material," in the third line of said paragraph, the following words, "or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation."

SEC. 3. That upon taking possession of such property, or leasing or assuming control thereof, just compensation shall be made therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States of America to recover such further sums as added to seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him through the several departments of the Government, and through such agency or agencies as he shall determine from time to time.

Approved, April 22, 1918.

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**EXECUTIVE ORDER OF JUNE 18, 1918, NO. 2883.**

[Repealed June 5, 1920. See section 1, merchant marine act, 1920.]

By virtue of authority vested in me by the act of Congress, entitled "An act to amend the emergency shipping fund provisions of the

urgent deficiency appropriation act, approved June fifteenth, nineteen hundred and seventeen, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes." approved April 22, 1918, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me by said act.

WOODROW WILSON.

THE WHITE HOUSE,  
18 June, 1918.

#### ARMY APPROPRIATION ACT.

[Act of July 9, 1918; 40 Stat. 845.]

#### CONDEMNATION OF TIMBER.

[Extract: 40 Stat. 888.]

SEC. 8. That the terms "State" and "States," as used in this chapter, shall be held to include the District of Columbia.

That the act entitled "An act to authorize condemnation proceedings of lands for military purposes," approved July second, nineteen hundred and seventeen [40 Stat. 241], as amended by an act approved April eleventh, nineteen hundred and eighteen [40 Stat. 518], be, and the same is hereby, amended, and its provisions in all respects, together with all its privileges and benefits, are hereby extended to the right of condemnation of standing or fallen timber, sawmills, camps, machinery, logging roads, rights of way, equipment, materials, supplies, and any works, property, or appliances suitable for the effectual production of such lumber and timber products, for the Army, Navy, United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation. That the right to institute such condemnation proceedings is hereby conferred upon the Secretary of War, the Secretary of the Navy, and the chairman of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, individually or collectively. Such right of condemnation shall be exercised by such officials only for the purpose of obtaining such property when needed for the production, manufacture, or building aircraft, dry-docks, or vessels, their apparel or furniture, for housing of Government employees in connection with the Army, Navy, or the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, and for the procurement of materials and equipment for aircraft, dry-docks and vessels. The jurisdiction of such condemnation proceedings is hereby vested in the District Courts of the United States, where the property which is sought to be condemned or any part thereof is located or situated, regardless of the value of the same.

And the President is hereby authorized through any department or the United States Shipping Board or said Fleet Corporation to sell

and dispose of any lands or interests in real estate acquired for the production of lumber and timber products, and to sell any logs, manufactured or partly manufactured or otherwise procured for the Army, Navy, or United States Shipping Board Emergency Fleet Corporation, or resulting from such manufacture or procurement, either to individuals, corporations or foreign states or Governments, at such price as he shall determine acting through the above representatives selling or disposing of the same, and the proceeds of such either to individuals, corporations or foreign States of Governments, of such procurement. \* \* \*

### DEFICIENCY APPROPRIATION ACT.

[Act of Nov. 4, 1918; 40 Stat. 1020.]

An act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes.

[Extract 40 Stat. 1022.]

### SHIPPING BOARD.

#### EMERGENCY SHIPPING FUND.

1. The emergency shipping fund provision of the urgent deficiency appropriations act of June 15, 1917, as amended by the act of April 22, 1918 (Public Act No. 138 of the Sixty-fifth Congress), is hereby amended as follows:

(I) In subdivision (d) of paragraph one, to begin said subdivision and to precede the words "to requisition," are now inserted the words: "To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interest therein; and"

(II) In subdivision (f) of said paragraph one, after the words "or assume control of," are now inserted the words "or to extend, improve, or increase, or cause to be extended, improved, or increased."

(III) After said subdivision (f) in said paragraph one, a new subdivision is now inserted as follows:

"(g) In pursuance of the foregoing powers, or any of them, to make advance payments or loans of such amounts and upon such terms as the President may deem necessary and proper."

(IV) In paragraph eight of said provisions, after the word "shipyard," are now inserted the words "dry-dock, marine railway, pier." In said paragraph the words "or other facilities connected therewith" are stricken out and there are now inserted after the word "terminal," the following words: "and any facilities or improvements connected with any of the foregoing descriptions of property."

2. For the acquisition or establishment of plants suitable for shipbuilding or ship maintenance or repair, or of materials essential

thereto, and for the enlargement or extension of such plants as are now or may be hereafter acquired or established, authority is granted to enter into contracts or otherwise to incur obligations for not to exceed \$34,662,500 in addition to the amounts heretofore appropriated: *Provided*, That obligations incurred hereunder may be met from appropriations made or to be made for the construction of ships.

3. The United States Shipping Board shall not require payment from the War Department for the charter hire of vessels furnished or to be furnished from July 1, 1918, to June 30, 1919, inclusive, for the use of that department when such vessels are owned by the United States Government.

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**EXECUTIVE ORDER OF DECEMBER 3, 1918, NO. 3018.**

[Repealed, June 5, 1920. See section 1, merchant marine act.]

Whereas, by Executive order, No. 2664, dated July 11, 1917, I delegated to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, certain powers vested in me under the section entitled "Emergency shipping fund" of the urgent deficiency appropriation act approved June 15, 1917; and

Whereas, since the issuance of said Executive order, the said powers granted in said act have been variously affected or extended by the section entitled "emergency shipping fund" of the urgent deficiency appropriation act approved October 6, 1917, by public act No. 138, Sixty-fifth Congress, approved April 22, 1918, amending said section of said act of June 15, 1917, and by the sections entitled "emergency shipping fund" in the sundry civil appropriation act approved July 1, 1918, and in the first deficiency appropriation act, 1919, approved November 4, 1918, respectively:

Now, therefore, by virtue of the authority vested in me by said laws, supplementing said order No. 2664, but in no way limiting or restricting the effect thereof, or of acts heretofore done in pursuance thereof, I do hereby delegate all the power and authority so vested in me, and do direct that—

1. The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; and

2. The United States Shipping Board shall have and exercise, subject to its discretion in turn to delegate such exercise as provided in said Executive Order No. 2664, all power and authority now vested in me by said laws with reference to constructed dry docks, marine railways and piers, and to constructed vessels or parts thereof or charters therein; to the operation, management, and disposition of such dry docks, marine railways, piers, and vessels; and to such other matters as are not herein mentioned.

3. All acts heretofore done by said corporation or by said board, with reference, respectively, to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes, or any of them, be, and they are hereby, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE,  
3 December, 1918.

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**EXECUTIVE ORDER OF MARCH 12, 1919, NO. 3063.**

WITHDRAWING FROM THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION CERTAIN POWERS WITH REFERENCE TO THE EMERGENCY SHIPPING FUND AND DELEGATING SUCH POWERS TO THE SECRETARY OF WAR.

Whereas, heretofore, by two Executive orders respectively numbered 2664, dated July 11, 1917, and numbered 3018, dated December 3, 1918, I delegated to the United States Shipping Board Emergency Fleet Corporation all the power and authority vested in me under certain laws establishing, enlarging, and maintaining the emergency shipping fund, in so far as such power and authority had reference to activities which might be directly or indirectly applicable to ship or plant construction; and

Whereas said Fleet Corporation, in pursuance of such power and authority, so delegated, and at my request, has entered into certain contracts for the construction of nineteen river barges and is now planning the construction of certain river towboats, all of said vessels being intended for use on the Mississippi River or its tributaries, and has further, at my request, in planning and in carrying out such construction, engaged the assistance of the Chief of Engineers, United States Army, and has heretofore transferred to him from its funds held under such delegated power and authority the sum of \$3,860,000, which sum has already been deposited by the Chief of Engineers in the Treasury of the United States to the credit of the War Department;

Now, in order to confirm the informal withdrawal from said Fleet Corporation and the informal delegation to the War Department, as effected by the acts above recited, of such part of my said power and authority as relates to such barges and towboats:

(1) I hereby withdraw from the United States Shipping Board Emergency Fleet Corporation such part of said power and authority vested in me by said laws with reference to activities which may be directly or indirectly applicable to ship or plant construction as relates to the construction of such nineteen river barges and such towboats and as relates to the sum of \$3,860,000 out of the funds heretofore appropriated under said laws for the construction of ships, and do hereby delegate the power and authority so withdrawn to the Secretary of War, to be by him executed through contract or other-



wise as in his judgment may be most economical and advantageous to the United States.

(2) I hereby ratify said payment by said Fleet Corporation to said Chief of Engineers of the sum of \$3,860,000 from said emergency shipping fund out of the appropriations heretofore made by the Congress for the construction of ships.

(3) I do hereby direct that the said Fleet Corporation shall forthwith transfer and assign to the Secretary of War any and all contracts heretofore entered into by the said Fleet Corporation for or on account of the construction of such barges or towboats, and shall perform such other acts in pursuance of such transfer and assignment as will effectuate the intent of this order.

WOODROW WILSON.

THE WHITE HOUSE,

12 March, 1919.

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**EXECUTIVE ORDER OF MARCH 12, 1919, NO. 3064.**

WITHDRAWING FROM THE UNITED STATES SHIPPING BOARD CERTAIN POWERS WITH REFERENCE TO THE EMERGENCY SHIPPING FUND AND DELEGATING SUCH POWERS TO THE SECRETARY OF WAR.

Whereas, heretofore, by two Executive orders respectively numbered 2664, dated July 11, 1917, and numbered 3018, dated December 2, 1918, I delegated to the United States Shipping Board all the power and authority vested in me under certain laws establishing, enlarging, and maintaining the emergency shipping fund, in so far as such power and authority have reference to constructed drydocks, marine railways, and piers, and to constructed vessels or parts thereof or charters therein, and to the operation, management, and disposition of such drydocks, marine railways, piers, and vessels; and

Whereas, by Executive order of this date, I have withdrawn from the United States Shipping Board Emergency Fleet Corporation such part of the power and authority vested in me under said laws with reference to activities which may be directly or indirectly applicable to ship or plant construction and as relates to the construction of certain nineteen river barges and certain towboats intended for use on the Mississippi River or its tributaries, and did by said order redelegate such power and authority to the Secretary of War; and

Whereas, I now deem it desirable that the power and authority vested in me with reference to the operation, management, and disposition of such vessels shall also be vested in the Secretary of War;

Now, THEREFORE, I do hereby withdraw from the United States Shipping Board such part of the said power and authority so vested in me under said laws, with reference to the operation, management, and disposition of vessels as relates to such river barges and towboats, and do hereby delegate to the Secretary of War the power



and authority so withdrawn from the United States Shipping Board, to be by the Secretary of War executed through contract or otherwise, as in his judgment may be most economical and advantageous to the United States.

WOODROW WILSON.

THE WHITE HOUSE,  
12 March, 1919.

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**SUNDRY CIVIL APPROPRIATION ACT (ACT OF JULY 19, 1919; 40 STAT. 163).**

[Extract, 40 Stat. 181.]

**EMERGENCY SHIPPING FUND.**

Any material or plant as defined under the emergency shipping fund provision of the deficiency appropriation act approved June 15, 1917, acquired by the United States Shipping Board Emergency Fleet Corporation may be disposed of as the President may direct.

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**EXECUTIVE ORDER OF AUGUST 11, 1919, NO. 3145.**

DIRECTING THE UNITED STATES SHIPPING BOARD AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION TO DISPOSE OF MATERIAL OR PLANTS IN THEIR DISCRETION.

Whereas, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1920, and for other purposes," approved July 19, 1919, provides:

"Any material or plant, as defined under the emergency shipping fund provision of the deficiency appropriation act approved June 15, 1917, acquired by the United States Shipping Board Emergency Fleet Corporation, may be disposed of as the President may direct."

And whereas, said deficiency appropriation act, approved June 15, 1917, as amended by "An act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes" approved November 4, 1918, defines the words "material" and "plant" as follows:

"The word 'material' shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof."

"The word 'plant' shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard, dry dock, marine railway, pier, or dockyard and discharging terminal and any facilities or improvements connected with any of the foregoing descriptions or property."

Now, therefore, by virtue of the authority vested in me by said laws, but in no way limiting or restricting the effect of previous

Executive orders and proclamations delegating powers and authority to the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation.

1. I hereby direct the United States Shipping Board to exercise all powers and authority now vested in me in reference to the disposition of materials or plants as above defined. I hereby direct said board, in its discretion, to sell, lease, or otherwise dispose of such materials and plants or any portions or parts thereof, by public or private sale or contract, with or without notice, in such lots, at such times and places, upon such credit, security and other terms or conditions, and in such manner generally as said board, from time to time, shall deem to the best advantage of the United States.

2. I hereby direct that such sales, leases, or other disposition shall be made directly by the said board or by it, in its discretion, through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

3. I hereby direct that all acts heretofore done by said corporation or by said board, with reference to such sales, leases, or other disposition and which could have been properly done by me under any statutes heretofore enacted covering this subject matter, be, and they hereby are, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE,  
11 August, 1919.

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**ACT OF OCTOBER 25, 1919; 40 STAT. 305.**

That all steam vessels owned or operated by the United States Shipping Board, or any corporation organized or controlled by it, shall be subject to all the provisions of Title 52 of the Revised Statutes of the United States for the regulation of steam vessels and acts amendatory thereof or supplemental thereto.

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**SUITS IN ADMIRALTY ACT OF MARCH 9, 1920.**

[41 Stat. 525.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: Provided, That this act shall not apply to the Panama Railroad Company.*

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States of such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this act.

SEC. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this act.

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this act shall be brought within one year after this act goes into effect; and shall other suits hereunder shall be brought within two years after the cause of action arises.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

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#### MERCHANT MARINE ACT OF JUNE 5, 1920.

[41 Stat. 988.]

An Act To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained.

SEC. 2. (a) That the following acts and parts of acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this act, provided:

(1) The emergency shipping fund provisions of the act entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the act entitled "An act to amend the emergency shipping fund provisions of the urgent deficiency appropriation act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the act entitled "An act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918;

(2) Section 3 of such act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such act of November 4, 1918; and

(4) The act entitled "An act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918.

(5) Sections 5, 7, and 8, shipping act, 1916.

(b) The repeal of such acts or parts of acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this act under any such act or part of act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such act or parts of acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such acts or parts of acts, but such acts or parts of acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in accordance with the provisions of such acts or parts of acts if, in the opinion of the board, the completion or conclusion thereof is for the best interests of the United States.

(c) As soon as practicable after the passage of this act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the

powers or duties conferred or imposed upon the President by any such act or parts of acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts hereby repealed.

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SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the acts or parts of acts repealed by section 2 of this act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this act.

SEC. 5. That in order to accomplish the declared purposes of this act, and to carry out the policy declared in section 1 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 6 of this act, all of the vessels referred to in section 4 of this act or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or prop-

erty which he is not forced to sell. All sales made under the authority of this act shall be subject to the limitations and restrictions of section 9 of the "Shipping act," 1916," as amended.

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SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this act, the provision in section 11 of the "Shipping act, 1916," to the contrary notwithstanding.

SEC. 13. That the board is further authorized to sell all property other than vessels transferred to it under section 4 upon such terms and conditions as the board may determine and prescribe.

SEC. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this act, or by the "Shipping act, 1916," or by the acts specified in section 2 of this act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the acts or parts of acts repealed by section 2 of this act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

SEC. 15. That the board shall not require payment from the War Department for the charter hire of vessels owned by the United States Government furnished by the board from July 1, 1918, to June 30, 1919, inclusive, for the use of such department.

SEC. 16. That all authorization to purchase, build, requisition, lease, exchange, or otherwise acquire houses, buildings, or land under the act entitled "An act to authorize and empower the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire, and to sell or otherwise dispose of improved or unimproved lands, houses, buildings, and



for other purposes," approved March 1, 1918, is hereby terminated: *Provided, however,* That expenditures may be made under said act for the repair of houses and buildings already constructed, and the completion of such houses or buildings as have heretofore been contracted for or are under construction, if considered advisable, and the board is authorized and directed to dispose of all such properties or the interest of the United States in all such properties at as early a date as practicable, consistent with good business and the best interests of the United States.

SEC. 17. That the board is authorized and directed to take over on January 1, 1921, the possession and control of, and to maintain and develop, all docks, piers, warehouses, wharves, and terminal equipment and facilities, including all leasehold easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto, acquired by the President by or under the act entitled "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses, and for other purposes," approved March 28, 1918.

The possession and control of such other docks, piers, warehouses, wharves, and terminal equipment and facilities or parts thereof, including all leasehold easements, rights of way, riparian rights and other rights, estates or interests therein or appurtenant thereto which were acquired by the War Department or the Navy Department for military or naval purposes during the war emergency may be transferred by the President to the board whenever the President deems such transfer to be for the best interests of the United States.

The President may at any time he deems it necessary, by order setting out the need therefor and fixing the period of such need, permit or transfer the possession and control of any part of the property taken over by or transferred to the board under this section to the War Department or the Navy Department for their needs, and when in the opinion of the President such need therefor ceases the possession and control of such property shall revert to the board. None of such property shall be sold except as may be hereafter provided by law.

SEC. 18. That section 9 of the "Shipping act, 1916," is amended to read as follows:

"SEC. 9. That any vessel purchased, chartered, or leased from the board, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided,* That foreign-built vessels admitted to American registry or enrollment and license under this act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.



"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

"It shall be unlawful to sell, transfer or mortgage, or, except under regulations prescribed by the board, to charter, any vessel purchased from the board or documented under the laws of the United States to any person not a citizen of the United States, or to put the same under a foreign registry or flag, without first obtaining the board's approval.

"Any vessel chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000, or to imprisonment for not more than five years, or both."

\* \* \* \* \*

Sec. 35. That the power and authority vested in the board by this act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.

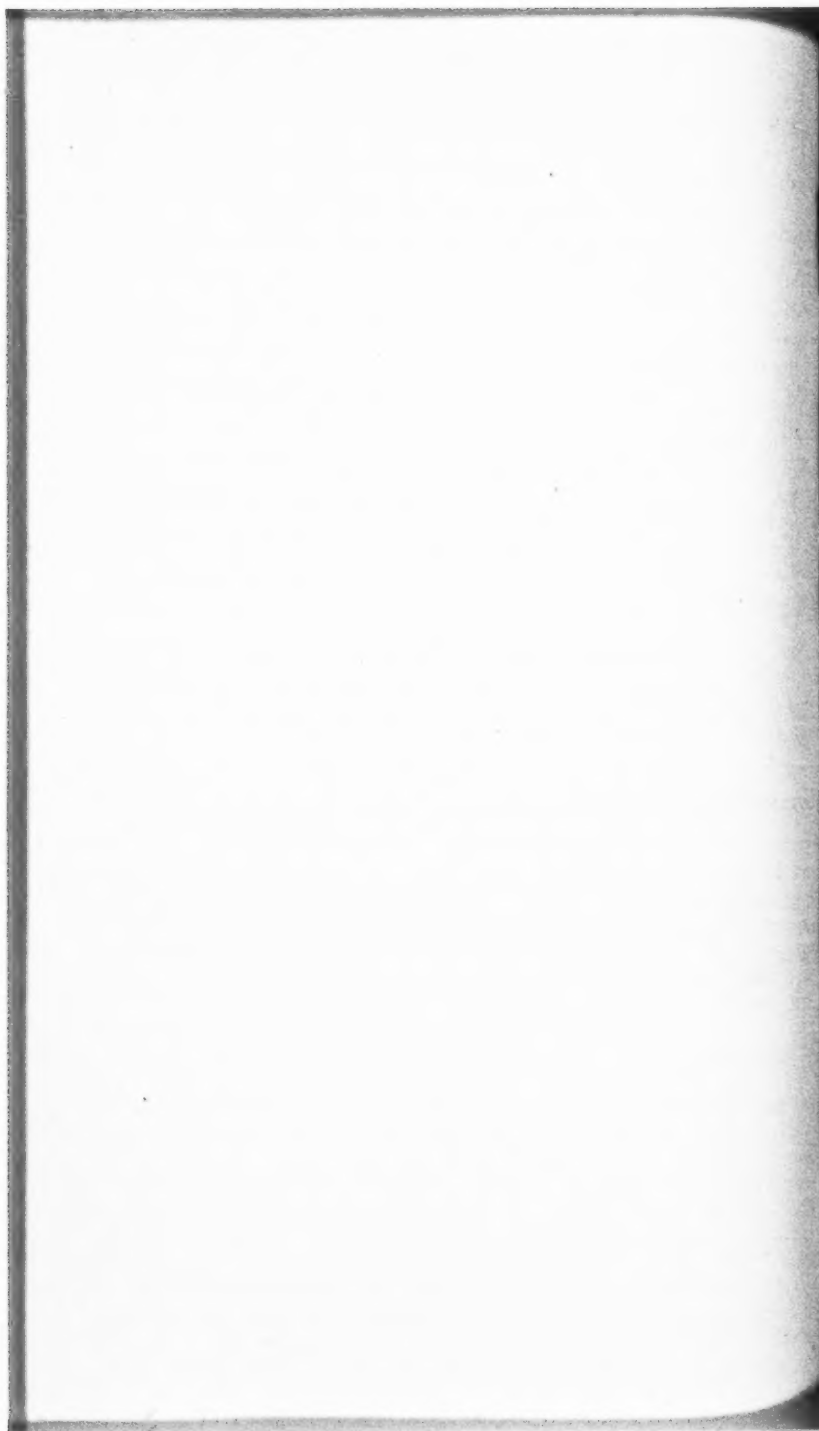
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**URGENT DEFICIENCY APPROPRIATION ACT OF AUGUST 24, 1921.**

[42 Stat. —.]

\* \* \* That no more than six officers or employees of the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation shall be paid an annual salary or compensation in excess of \$11,000.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1921.

SLOAN SHIPYARDS CORPORATION ET AL.,  
appellants,  
v. [272 Fed. 132.]  
UNITED STATES SHIPPING BOARD EMER-  
gency Fleet Corporation and United  
States of America, appellees. } No. 308.

*Appeal from the District Court of the United States for the Western District of Washington.*

ASTORIA MARINE IRON WORKS, PLAIN-  
tiff in error,  
v. [270 Fed. 635.]  
UNITED STATES SHIPPING BOARD EMER-  
gency Fleet Corporation, defendant in  
error. } No. 376.

*In error to the District Court of the United States for the District of Oregon.*

UNITED STATES SHIPPING BOARD EMER-  
gency Fleet Corporation, petitioner,  
v. [274 Fed. 803.]  
ROGER B. WOOD, TRUSTEE IN BANK-  
ruptcy. } No. 526.

*On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## BRIEF FOR THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

Nos. 308 and 376 involve the single question whether the United States Shipping Board Emergency Fleet Corporation (hereafter called the Fleet

Corporation) is, or is not, suable with respect to construction contracts which it entered into "*representing the United States of America*" in the execution of the war powers of Congress; and No. 526 involves the question whether debts due the Fleet Corporation are entitled in a bankruptcy distribution to enjoy the same priority as debts due to the United States. The answer to both questions depends, in turn, upon the question whether or not the Fleet Corporation was, in the transactions to be considered, acting as an instrumentality of the Federal Government or as a private corporation.

The *Eastern Shore Case*, No. 526, involves the further question whether the priority of the United States extends to debts arising on a contract made by the Fleet Corporation "*representing the United States of America.*"

The Fleet Corporation was not a private corporation engaged in ordinary private functions for trade and profit, in which the interest of the United States was expressed by its ownership of \$50,000,000 capital stock,<sup>1</sup> but the Fleet Corporation acted, in respect to the matters involved here, as a public corporation solely for the great national purpose of executing the war powers of Congress; and the United States's ownership of the capital stock was only an incidental means of securing to it the absolute control over the instrumentality which Congress thought would be more effective in a corporate form than if exercised by individual agents. (*McCulloch*

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<sup>1</sup> *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904, 907; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Bank of Kentucky v. Wister*, 2 Pet. 318, 322; *U. S. v. Strang*, 254 U. S. 491, 493.

v. *Maryland*, 4 Wheat. 316, 409-423; *Osborn v. Bank*, 9 Wheat. 738, 860-868; *First National Bank v. Union Trust Co.*, 244 U. S. 416, 425; *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180). That this is so is clearly shown by the circumstances which brought about the organization of the Fleet Corporation and its war-time activities (p. 8-34, *infra*).

In these cases it is not necessary to decide whether the Fleet Corporation is, in every case, entitled to Governmental priorities and immunities, but only whether it is so entitled when acting as the delegate of the President under the war powers.

There has been a wide diversity of opinion among the District Courts on this subject.<sup>2</sup>

<sup>2</sup>(a) The District Courts of Washington and Oregon have held that the Fleet Corporation is but an incorporated bureau or instrumentality of the Federal Government and hence suable, if at all, only in the Court of Claims, or for less than \$10,000 in the District Courts. (*Sloan Shipyards Corp. v. U. S. Fleet Corp.*, 268 Fed. 624; s. c. 272 Fed. 132; *Astoria Marine Iron Wks. v. U. S. Fleet Corp.*, 270 Fed. 635.) The same view was entertained in several criminal, tax and tort cases. (*U. S. v. Carlin*, 259 Fed. 904; *U. S. v. Union Timber Products Co.*, Id. 907; *U. S. v. Coghlan*, 261 Fed. 425; *Ballaine v. Alaska Northern Ry. Co.* (C. C. A.), 259 Fed. 183.)

(b) The District Courts of Pennsylvania, New York, Illinois, and Florida, and the State courts of Pennsylvania and New York have held that the Fleet Corporation is suable as any private corporation (*Com. Finance Co. v. Landis*, 261 Fed. 440; *Gould Coupler Co. v. U. S. Fleet Corp.*, Id. 716; *Lord & Burnham Co. v. U. S. Fleet Corp.*, 265 Fed. 955; *Perna v. U. S. Fleet Corp.*, 266 Fed. 896; *Banque-Russo., etc., v. U. S. Fleet Corp.*, Id. 897; *Pope v. U. S. Fleet Corp.*, 269 Fed. 319; *Eichberg v. U. S. Fleet Corp.*, 273 Fed. 886; *Haines v. Lone Star Co.*, 268 Pa. 92; *Ingersoll Rand Co. v. U. S. Fleet Corp.*, 187 N. Y. S. 695), but only in the Federal courts (*Southern Bridge Co. v. U. S. Fleet Corp.*, 266 Fed. 747) and not in tort (*Keeley v. Kerr*, 270 Fed. 874; contra *Am. Cotton Oil Co. v. U. S. Fleet Corp.*, Id. 296).

Reasoning tending to sustain its general suability will also be found in *Fed. Sugar Ref. Co. v. U. S. Sugar Equalization Board*, 268 Fed. 575; *In re Eastern Shore Shipbuilding Corp.*, 274 Fed. 893; *Panama R. Co. v. Curran* (C. C. A.), 256 Fed. 768; *Salas v. U. S.* (C. C. A.), 234 Fed. 842.

(c) A careful attempt to reconcile the opposing views, by making the question of suability depend on the fact whether the Fleet Corporation was, in the particular instance, acting for itself in general commercial business or was acting as agent for the United States, was made in *Ingram-Day Lumber Co. v. U. S. Fleet Corp.*, 267 Fed. 283.

**STATEMENT OF THE CASE.****SLOAN SHIPYARD CASE; NO. 308.**

By a contract dated May 18, 1917,\* as amended and greatly modified by a subsequent and more elaborate contract dated May 1, 1918, between (1) the Sloan Shipyards and (2) the Fleet Corporation "*representing the United States of America*" (R. 41), the Sloan Shipyards agreed to build 16 wooden ships for the Fleet Corporation "*representing the United States of America*" at a contract price of \$18,800,000, and gave a \$1,000,000 mortgage covering all its property (including the capital stock and property of two subsidiary companies) to secure the performance of the construction contract (R. 35-57).

On February 11, 1920, the Sloan Shipyards filed its bill in equity in the Federal court against the Fleet Corporation seeking to cancel the \$1,000,000 mortgage and for a general "accounting," upon the ground that the Fleet Corporation had, about December 1, 1917, seized possession of all the property of the Sloan Shipyards and of its subsidiaries, and had wastefully and extravagantly proceeded, in the name of the Sloan Shipyards, to construct the ships, to cancel advantageous contracts for material and supplies, to make new contracts therefor at increased prices, and generally so to operate the plants as not only to deprive the company of the legitimate profits it would have made on the construction of the ships, but also to create large debts against it. (R. 1-10; amended bill filed Mar. 21, 1921, R. 21-58.)

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\*The initial contract did not contain the words "*representing the United States of America*," as it was made before any war powers had been conferred on the Fleet Corporation or any money paid in. It was superseded by the later contract.

The United States appeared specially and moved that the bill be dismissed for want of jurisdiction, suggesting that the Fleet Corporation was a mere department or instrumentality of the United States; that all of the contracts and transactions alleged in the bill were executed or done by the Fleet Corporation, not on its own behalf, but "solely as the agent and instrumentality of the United States of America"; that the action was, in effect, a suit against the United States and, in part at least, in tort; that it involved more than \$10,000 and only the Court of Claims had jurisdiction thereof, if indeed any court had, in view of the plaintiff's failure to follow the statutory provisions for obtaining "just compensation" for the taking of private property. (R 11-12, 59.) The Fleet Corporation made similar motions. (R. 12-13, 59.)

The District Court dismissed the bill in a careful opinion (R. 14-18; 268 Fed. 624; which was reiterated after a consideration of *U. S. v. Strang*, 254 U. S. 491, R. 19; 272 Fed. 132) for want of jurisdiction (R. 60, 61), and a certificate was duly given (R. 61).

**ASTORIA MARINE IRON WORKS CASE; NO. 376.**

By a contract dated February 1, 1919, between the Astoria Marine Iron Works (hereinafter called the Astoria Co.) and the Fleet Corporation "*representing the United States of America*" (R. 14), the Astoria Co. agreed to furnish a site and to construct thereon a marine railway and repair plant by September 15, 1919; the Fleet Corporation agreed to lend the Astoria Co. 70 per cent of such cost, to be secured by a mortgage on the plant and other prop-

erty; the property was to be operated under rules, and preference given in the use thereof to vessels, prescribed by the United States Shipping Board or by the Fleet Corporation; and the Astoria Co. agreed, on demand, to furnish the United States Government a list of its requirements for materials and the contracts therefor, and to comply with all instructions issued by the United States with respect thereto (R. 14-32).

On August 31, 1920, the Astoria Co. brought suit at law in the State Court of Oregon against the Fleet Corporation for \$428,053.74 damages for breach of contract, alleging that the Astoria Co. had spent \$128,053.74 in the construction of the plant, but that the Fleet Corporation repudiated the contract, refused to advance the loan, etc.; that it would cost \$25,000 to remove the partly constructed plant in order to make the land available for other uses; and that the Astoria Co. suffered \$275,000 loss of profits by the Fleet Corporation's breach of contract. (R. 3-13.)

The case was removed to the Federal court (R. 56); and the Fleet Corporation demurred to the petition upon the ground that it was a department of the United States Government; that the suit was, in effect, against the United States; that the State court had no jurisdiction over a suit against the United States; and that, as over \$10,000 was involved, the Federal court had no jurisdiction. (R. 57, 58.)

The court sustained the demurrer upon the ground that the Fleet Corporation was exercising govern-

mental functions for the United States, and that the latter was not suable, save in the Court of Claims, for sums over \$10,000 (R. 59-62; 270 Fed. 635); and the plaintiff declining to plead further, the petition was dismissed for want of jurisdiction (R. 63) and a certificate given (R. 67).

**EASTERN SHORE SHIPBUILDING CASE, NO. 526.**

By a contract dated August 22, 1918, between the Eastern Shore Shipbuilding Corporation (hereinafter called the Eastern Shore) and the Fleet Corporation, "*representing the United States of America*" (R. 54), the Eastern Shore agreed to build six wooden tugs for the United States (R. 62, "Title") for a lump sum of \$879,000. The Fleet Corporation paid to the Eastern Shore \$428,017.72 on account of the contract price before the Eastern Shore went into bankruptcy on March 20, 1919 (R. 78, 90). The Fleet Corporation took over the uncompleted tugs worth \$100,000 (R. 78) and filed a claim in bankruptcy, which was allowed to the extent of \$328,017.72 (R. 79), and petitioned that it be allowed priority therefor as a debt due to the United States (R. 3). The Fleet Corporation's claim was allowed as a general claim only (R. 79), but the claim for priority as a debt *due the United States* was denied by the referee (R. 75-78), by the District Court (R. 84), and by the Circuit Court of Appeals for the Second Circuit (R. 89-98, 274 Fed. 893), to review which a *certiorari* was allowed (R. 100).



### ASSIGNMENTS OF ERROR.

The only error assigned by the Fleet Corporation is that the court erred in denying the Fleet Corporation priority of payment. (R. 86.)

### HISTORICAL BACKGROUND OF UNITED STATES' WAR AGENCIES.

#### THE PERILOUS WAR SITUATION WHICH CAUSED THE CREATION OF THE FLEET CORPORATION.

*Congress's precautionary war measures.*—In view of (1) the imminent danger of war with Germany, which existed in 1915 and 1916<sup>3</sup> and (2) "the ill effects of the world-wide shortage in shipping" on our foreign commerce (250 U. S. 250),<sup>a</sup> Congress, in peace time, adopted a number of precautionary measures looking directly to the time when war would be declared, notably the national defense act (June 3, 1916; 39 Stat. 166); naval appropriation act (Aug. 29, 1916; 39 Stat. 556); Council of National Defense act (Aug. 29, 1916; 39 Stat. 619); and shipping act, 1916

<sup>3</sup> As the result of the submarine warfare; sinking of many American vessels, attempted destruction of merchant vessels while in, or sailing from, New York harbor; planning here raids and outrages in Canada; fomenting strikes to destroy our industries and commerce; inciting troubles in India and Mexico and other violations of our neutrality laws; and fraudulent passports. (See the diplomatic correspondence with Germany regarding submarine warfare and especially the *Lusitania*, *Palapa*, *Cushing*, *Wm. P. Frye*, *Gulfricht*, *Petrolite*, *Arabic*, *Ancona*, and *Sussex* incidents; recall of Boy-Ed and von Papen; President Wilson's addresses to Congress on April 19, 1916; Feb. 26, Apr. 2, and Dec. 4, 1917; "Flag Day Address" June 14, 1917, annotated by Committee on Public Information; "The War Message and the Facts behind it," War Information Series No. 1; Report of Secretary of Navy, 1918, p. 179.)

<sup>a</sup> For the injurious effect on American commerce see Hearings before House Committee on Merchant Marine, 64th Cong., 1st sess., on H. R. 10500, p. 39, 62; Smith's "Influence of the Great War Upon Shipping," pp. 31, 34, 41; Lloyd's Weekly, May 7, May 28, Oct. 22, 1915; Jan. 14, Feb. 25, 1916; Senate Doc. No. 713, 63d Cong., 3d sess., p. 8; Congressional Record, vol. 55, p. 2673.

(Sept. 7, 1916; 39 Stat. 728), which acts, *inter alia*, (a) authorized the President in time of war or threatened war (or, in some instances "when war is imminent") to place compulsory orders for products or material, to take possession of and to operate industrial plants, ships, railways and other transportation systems, and to control the disposition of American vessels; (b) created a Council of National Defense charged with the duty of investigating and recommending measures of war preparation, etc., and (c) authorized the President to choose the agencies by which he would execute the powers conferred on him.

*The Shipping Act of September 7, 1916.*—The Shipping Act, 1916 (39 Stat. 728), designed to create both a naval auxiliary and reserve, and also an American merchant marine, was modeled after the interstate commerce act, and prohibited rebates, preferences, unfair competition, retaliatory and unjust discriminatory measures in water transportation; required the publication of the rates and trade agreements of water carriers; provided that during war or "any national emergency" as proclaimed by the President, no American vessel should be sold or chartered to any alien or transferred to a foreign flag without the consent of the "United States Shipping Board"; and gave to such Shipping Board (which was a body of five members \*created by the act) the power to prescribe rates and to investigate violations of the act.

The Shipping Board was also given the power (1) to build or purchase vessels for naval or military

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\* Increased to seven by Merchant Marine Act, 1920.

purposes; (2) to receive certain ships from the War and Navy Departments; (3) to sell or lease\* any vessel however acquired; (4) to investigate and report to Congress on the cost of shipbuilding, navigation laws, and marine insurance; and (5) in order "to carry out the purposes of this act" (one of which purposes was the construction of vessels "for use as naval auxiliaries or army transports," sec. 5) to form a \$50,000,000 corporation under the laws of the District of Columbia for the purchase and construction of "merchant vessels in the commerce of the United States"; and "on behalf of the United States" to subscribe for the entire \$50,000,000 capital stock, which corporation, however, should "stand dissolved" at the end of "five years from the conclusion of the present European war", if the United States then owned any stock therein, and all its property should revert to the Shipping Board to be sold and the net proceeds covered into the United States Treasury.

The Shipping Board was as exclusively an agency or department of the United States Government as was the Interstate Commerce Commission, the Secretary of the Navy, the War Trade Board, the Federal Reserve Board or the Federal Trade Commission. (See Smith's *Influence of the Great War upon Shipping*, pp. 188-192, 271-307; Senate Report No. 689, pp. 3, 12, 14, 22, 53, 64th Cong., 1st sess.; House Report No. 659, pp. 32, 34, 42, 64th Cong., 1st sess.; *Minority Rep.* pp. 3, 4.)

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\* But with absolutely no power of operation save through the subsidiary corporation, and then only under exceptional conditions when specially authorized by the President. §11.

But while the United States now had an organization authorized and supplied with funds to build or buy ships, it was confronted with the situation (1) that it could not *buy* ships from foreigners because practically all of the belligerent and neutral Governments refused to permit transfers of ships to another flag;<sup>b</sup> (2) that it could not *build* ships, as American shipyards were filled with orders for two years ahead;<sup>c</sup> and (3) that it was wholly unable to acquire any ships.<sup>d</sup>

*The organization of the Shipping Board.*—For several months after the passage of the Shipping Act, 1916, nothing was done, but coincident with Germany's declaration of unrestricted submarine warfare, the Shipping Board, which had just been confirmed, met and formally organized on January 30, 1917. For the next two and one-half months it did little or nothing, except to prohibit the transfer of American ships to foreign flags and to determine upon a huge program for building wooden ships. (Smith's Influence of the Great War upon Shipping, pp. 274-276; Hearings before Senate Committee on Commerce, 65th Cong., 2d sess., Vol. 1, pp. 1065-1068.)

<sup>b</sup> Hearings before Senate Committee on Commerce, 64th Cong., 1st sess., on H. R. 15455, p. 210.

<sup>c</sup> Hearings before House Committee on Merchant Marine, 64th Cong., 1st sess., on H. R. 10500, p. 52; Hearings before Senate Committee on Commerce, 64th Cong., 1st sess., on H. R. 15455, p. 216; Hearings before Senate Committee on Commerce, 65th Cong., 2d sess., on S. R. 170, p. 1067.

<sup>d</sup> Hearings before Senate Committee on Commerce, 65th Cong., 2d sess., on S. R. 170, pp. 74, 1084-1085; Hurley's "The New Merchant Marine," p. 36.

It was perfectly obvious that the only way in which the Shipping Board could obtain ships was through the power of the Government to *commandeer* the ships, or contracts for ships, then building in American shipyards, largely for foreigners. But at that time no legislation existed authorizing the Shipping Board to exert any such high sovereign prerogative.<sup>c</sup>

*The submarine menace in April, 1917.*—In the meantime (February, March, and April, 1917) German mines and submarines had sunk the enormous total of 1,993,737 gross tons of 470 ocean-going <sup>4</sup> merchant vessels, which destruction in three months was more than the combined losses of the years 1914–15; was nearly as much as the entire loss in 1916; was more than the entire world's new ship construction in 1916 (Salter's Allied Shipping Control, p. 355–361); and the end was not yet, for the losses continued for months thereafter at an average of 500,000 tons a month, or many times the whole world's ship producing capacity (id.).

In two weeks in April, 122 ocean-going vessels were sunk; while of British ships alone there were sunk between April 15–30 no less than 94 merchant vessels ranging from 1,000 to 12,000 gross tons each, which was at the rate of one out of every four ships leaving the United Kingdom being lost before it returned. Nor was that all, for there were enormous

<sup>c</sup> "Memorandum from the President to the Chairman of the Senate Committee on Commerce;" see Hearings, 65th Cong., 2d sess., on S. R. 170, p. 1106, *et. seq.*

<sup>4</sup> 1,000 ships of all classes with much additional gross tonnage.

losses in ships damaged or molested (but not sunk); which, in the case of British vessels, alone, amounted to 261 ships, of 1,192,602 tons with 103 lives lost in the same three months; so that in such three months' period, British shipping was sunk or damaged to the extent of 776 ships of 2,417,832 gross tons, with a loss of 2,369 lives. If the shipping of other allied and neutral nations were included the figures would be far greater. (Salter's Allied Shipping Control, pp. 117 et seq.; British White Paper No. 199 on Merchant Shipping Losses, pp. 162-164.)

The losses during the first six months of 1917 were 3,856,307 tons and the new construction was less than one-third thereof, to wit, only 1,272,094 tons. (British White Paper Cd. 9221.)

But even those figures do not adequately show the peril, for during the first six months of the intensive campaign (February-July, 1917) British merchant vessels were sunk, damaged, and molested to the appalling extent of 1,488 vessels, 4,929,185 tons with 3,895 lives lost. (British White Paper No. 199, pp. 162-164.)

Intentionally misled by the official method of publishing the weekly losses of, say, 40 British, or 50 British, allied, and neutral ships, per week, in conjunction with the figures of about 5,000 arrivals and departures at British ports, the public did not realize that of the 2,500 arrivals, about 2,360 were merely cross-channel ships or small coastwise vessels, never seriously at risk; and consequently the general public did not appreciate that about 40 British

ocean-going ships, or 50 British, allied, and neutral ocean-going ships, were lost each week out of 140 arrivals, and that the losses were at the rate of 1,000,000 tons a month. (Id.; Confidential Hearings before Senate Committee on Appropriations (65th Cong. 1st sess.) on H. R. 3971, May 12-14, 1917, pp. 101-103, 122, 123.) The continued loss at this rate would have brought disaster upon all of the allied campaigns and might easily have involved an unconditional surrender to Germany (Id.).

On April 12, 1917, the British prime minister said in a public speech upon the entry of the United States into the war:

The road to victory, the guarantee of victory, the absolute assurance of victory, is to be found in one word, "ships," in a second word, "ships," and in a third word, "ships." (London Times, Apr. 13, 1917, p. 8, col. 2.)

In course of time even the public learned the seriousness of the situation, and Mr. Lloyd George made desperate appeals for ships. (See London Times, May 26, July 23, Aug. 17, Sept. 8, Oct. 23, Nov. 1, Nov. 26, Dec. 15, Dec. 21, Dec. 22, 1917; Mar. 21, May 25, 1918.)

On December 14, 1917, Mr. Lloyd George referred to the defection of Russia, the disaster in Italy, and the delay in the arrival of the American armies, and said:

**TONNAGE IS VICTORY.**

Victory is now a question of tonnage and *tonnage is victory.*

Nothing else can defeat us now but the *shortage of tonnage.* The advent of the United

States into the war has increased the demand enormously. Tonnage must be provided for the transportation of that gigantic new army with its equipment across thousands of miles of sea. It is no use raising 10,000,000 men and equipping them unless you get them somewhere in the vicinity of the foe. Germany has gambled on America's failure to transport her armies to Europe and that is why she is still laughing at the colossal figure of soldiers in training and airplanes in the course of construction \* \* \*.

But both America and ourselves will have to strain our resources to the utmost to *increase the tonnage* available. The fact that America's tonnage will be absorbed in the transport of her own armies makes it necessary that we should increase our responsibilities in the matter of assisting our French and Italian allies to transport essential commodities to their shores. We must therefore *increase our tonnage* \* \* \*.

As the *whole future of this country and of the world* depends on the efforts Britain and America make this year to *increase the output of ships*, we are resolving that it must, and shall, be done.

On December 21st he said:

The struggle now becomes a *question of tonnage*; nothing else can beat us and nothing else will win for us—that is, everything else that we provide will be of no account unless we meet the *tonnage* situation. Shipping tonnage means guns, it means airplanes, ammu-



nition, tanks, and troops, whether in France or in the East.

*It is now all a question of ships.* I pointed out yesterday to the House of Commons that the reserve of man power of the allied countries is twice that of Germany and her allies, but it is no use having a great reserve of the best fighting material that the world can produce *unless you have the ships* to ship it into the fighting lines.

Therefore, the question of *building ships* and saving ships *is the question of victory or defeat* for this country. America has an enormous reserve of untapped man power, but there are thousands of miles of sea across which you have to bring them with their supplies and equipment and there again *you must get ships.*

Germany *destroyed* during the war 6,611 merchant vessels of 12,869,421 tons; and in addition damaged or molested 1,885 British vessels having 8,007,967 tons, a total of 8,496 vessels with 20,877,388 tons which fell under German hostile action, or over half of the entire world's tonnage (Nautical Gazette, July 26, 1919; British Admiralty, August, 1919; Bogart's "Direct and indirect costs of the Great World War," pp. 289-291; *See also* Report of the Allied Maritime Transport Council 1918, regarding the vital necessity for tonnage).

From April, 1917, the warring Governments had clearly seen that the outcome depended on whether the Allies could build ships faster than Germany destroyed them.

*United States enters the war.*—On April 6, 1917, the United States declared war on Germany; Congress directed the President to employ the entire resources of the Government to carry on the war, and pledged all the resources of the country to win it (40 Stat. 1).

While America's entry into the war brought ultimately great reinforcements to the armies of the Allies and settled forever the question of finance favorably to the Allies, it not only did not alleviate ship production, but actually increased the strain thereon, and necessitated a greater shipbuilding program than ever before.

In Salter's *Allied Shipping Control*, one of the volumes in the *Economic and Social History of the World War*, published by the Carnegie Endowment for International Peace, the subject is well stated thus (pp. 3, 4, 6, 80, 122, 174):

“During the year 1916, the average monthly losses of British ocean-going ships were 24. In the first six months of 1917 the average rose to 80. When the new campaign was in full force 78 British ships of this type were lost in a single fortnight. \* \* \*

In the first three months 470 ocean-going ships (including all classes of ships, the total was 1,000) had been sunk. In a single fortnight in April 122 ocean-going vessels were lost \* \* \*. By the end of 1917 Great Britain, France and Italy had at their disposal a total mercantile marine that amounted to 18,000,000 tons as compared with 24,500,000 tons before the war, and of this reduced ton-

nage there were employed about 5,500,000 tons in direct war service.

Every month the direct requirements of the combatant forces were increasing, and the pressure on the diminished margin of the supplies required for civilian life and for the manufacture of ammunition was becoming more serious \* \* \*.

For over a year it [submarine campaign] had been the main hope, and by no means the impossible hope, of the Germans, and the main danger—a very deadly one—to the Allies' cause. \* \* \*

While America's entry into the war brought no substantial new tonnage immediately available for war service, her military effort began very soon to *increase the general strain on the tonnage of the world*. In the event this military effort developed to such dimensions and at such a pace that great as were America's subsequent additions to the war service, *she never had as many ships in this service as those required to carry her own men and stores*. Her entry into the war therefore immediately, and in one sense throughout the remainder of the war, made the Allies' task of finding transport for their war stores more, rather than less, difficult \* \* \*.

Again America's military effort by which 2,000,000 men were sent to France before autumn [1918] is a matter of history. The extra strain, the transport of the men and still more of the supplies to maintain them, strained the Allies' shipping reserves to the utmost. They could now look for no new

assistance for their own imports from America; *ultimately they had indeed to provide tonnage in aid of America herself.*

Personal recollections, the newspapers of the time, and the authorities cited in the margin,<sup>5</sup> testify to the seriousness of the menace and to the belief that America's success in the war depended upon the ability to produce ships quickly enough.

*Plea for more ships.*—Although the public did not then know the true danger, President Wilson was informed by confidential advices from Ambassador Page and the Navy Department that the success of the increasing number of German submarines constituted the real crisis of the war; that the communications with the fighting fronts was threatened; that

<sup>5</sup> New York Times Current History, March, 1917, p. 994, "Entente ship-building vs. U-boats;" Current Opinion, Sept., 1917, p. 210, "How shipyards are speeding up to challenge the U-boats;" American Review of Reviews, October, 1917, p. 393, "Build ships to beat submarines," in which it was said: "The submarine is sinking ships twice as fast as they are being built \* \* \*. The building of ships is the most pressing of all needs that can be met. For this we are the only hope, for the best that can be done in England, France, and Italy leaves their possible 4,000,000 tons a year far below the submarine's sinking \* \* \*. We must build ships or dig graves." Scientific American, March 30, 1918, "Shipbuilder vs. Submarine;" Illustrated World, April, 1918, p. 251, "Ships to smash the sub blockade;" New York Times Current History, May, 1918, p. 286, "Admiralty summary of British losses," showing that on Dec. 31, 1917, there was a net loss in world's tonnage of 2,632,297 tons; (Id.) August, 1918, p. 248, "Shipping losses and shipbuilding progress," showing that in the first six months of 1918 the Fleet Corporation's output (502,655 tons) was almost as great as the United Kingdom's 568,330 tons; Economic World, Nov. 30, 1918; U. S. Commerce Reports, Nov. 30, 1918, p. 689, "War losses of American shipping;" Economic World, March 15, 1919, "The world's merchant shipping losses in the war;" Official United States Bulletin, March 25, 1919, p. 6; Economic World, Mar. 29, 1919, p. 448; British White Paper Cd. 9221; Id., No. 199; Salter's Allied Shipping Control, pp. 3, 80, 83, 174, 199, 356-361, and chapters, "The struggle at sea," pp. 117-133, "The autumn of 1917," and "The formation of the allied maritime transport council;" Kirkaldy's "British Finance, 1914-1921," pp. 228-235.

the control of the seas was actually imperiled; that the submarine campaign was then the paramount issue of the war, and that the situation was increasingly critical; that the maintenance of the British armies in the field was threatened; that there was only food enough to last the civil population in Great Britain for six weeks or two months; that "There is every reason for the greatest alarm about the issue of the war, caused by the increasing success of the German submarines," and that it was "the sharpest crisis of the war and the most dangerous situation for the allies that had arisen or could arise," and that "there is but one method of meeting the submarine issue, upon which there is also complete unanimity—increased number of merchant bottoms, preferably small. 'More ships! More ships! More ships!' is heard on every hand." (Hearings before Senate Committee on Naval Affairs, 66th Cong., 2d sess., vol. 1, pp. 29–41; Jellicoe's *Crisis of the Naval War*, pp. 51, 109, 158; Sims' *The Victory at Sea*, pp. 7–49, chapter, "When Germany was winning.")

No effective antisubmarine devices had been devised. The Russian revolution had destroyed Russia's effective cooperation. The crisis of the war was at hand.

It was with that background of peril that the Fleet Corporation was born.

**APRIL 16, 1917, EMERGENCY FLEET CORPORATION  
ORGANIZED.**

*President Wilson's appeal for ships.*—On the morning of April 16, 1917 (the same day that saw Gen. Nivelle's great French offensive begun and fail, followed by mutinies in the French army which threatened defeat for the Allies), acting in response to England's desperate call for ships, President Wilson published this appeal to his "Fellow-Countrymen":

*We must supply ships by hundreds out of our shipyards to carry to the other side of the sea—submarines or no submarines—what will every day be needed there \* \* \* everything with which the people of England, France, Italy and Russia have usually supplied themselves, but cannot now afford the men, materials, or machinery to make \* \* \*.*

*[Let me suggest] to the shipbuilder the thought that life and war depend upon him. Food and war supplies must be carried across the seas, no matter how many ships are sent to the bottom. The places of those that go down must be supplied—and supplied at once.*

As America's capacity at that time for building ships was very limited, it was obvious that unprecedented exertions would have to be made to fulfill the President's demand that ships should be supplied "by hundreds" and that "no matter how many ships are sent to the bottom" their places "must be supplied at once."

*Organization of the Fleet Corporation.*—On the same day, in response to that appeal, the Shipping Board, acting under the direct authority of section 11 of the Shipping Act, caused to be organized under the laws

of the District of Columbia, the Emergency Fleet Corporation; subscribed for its \$50,000,000 capital stock on behalf of the United States, which still owns it; and the Fleet Corporation became a mere "operating agency" of the Shipping Board (*Sloan case*, R. 34; *The Lake Monroe*, 250 U. S. 246, 251-2).<sup>6</sup>

But as the law then stood, the Fleet Corporation's powers were limited to the construction of ships in ordinary competition with private yards, without power to requisition plants or material, or to operate ships.<sup>6</sup>

To cure that defect new legislation under the war power was passed, by which

**THE FLEET CORPORATION WAS CONSTITUTED A GREAT WAR INSTRUMENTALITY OF THE FEDERAL GOVERNMENT, AS DELEGATE OF THE PRESIDENT'S WAR POWERS.**

*Expenditure of public moneys.*—By a series of war-time acts Congress appropriated the enormous sum of \$3,313,553,000 for direct use by the Fleet Corporation, which has spent practically all of it.<sup>7</sup> In

<sup>6</sup> The reason for using a corporation as the building and operating agency of the Board, was the belief that the Shipping Board could contract with the Fleet Corporation just as freely as with any private shipbuilder, and by that expedient technically avoid the red tape of Government procedure, the delays of civil service, and the numberless bothers, checks and balances of the Government which would be applicable to the Shipping Board if it undertook to build the ships directly. ("Influence of the Great War on Shipping," p. 277; First Annual Report of Shipping Board, pp. 6-7.)

<sup>7</sup> Act June 15, 1917 (40 Stat. 183-184).....	\$405, 000, 000
Act Oct. 6, 1917 (40 Stat. 345).....	635, 000, 000
Act July 1, 1918 (40 Stat. 650-651).....	1, 806, 701, 000
Act July 11, 1919 (41 Stat. 42).....	500, 000
Act July 19, 1919 (41 Stat. 180).....	356, 000, 000
Act June 16, 1921 (Public No. 18—67th Cong.).....	61, 852, 000
Act Aug. 24, 1921 (Public No. 69—67th Cong.).....	48, 500, 000
<b>Total.....</b>	<b>3, 313, 553, 000</b>

For all appropriations and the disposition or application thereof up to July 1, 1921, see Hearing before House Committee on Appropriations "Independent Offices Bill, 1923," 67th Cong., 2d sess., p. 825.

addition, all the net receipts from the Fleet Corporation's operation of the ships—amounting to tens of millions of dollars—were spent on the acquisition of ships and property, all which is United States property.

This was in addition to the \$50,000,000 capital stock paid in by the United States in installments between July 28–November 16, 1917; and soon spent in administration expenses.

*The Fleet Corporation as the delegate of the President's war powers.*—By the emergency shipping fund act of June 15, 1917 (40 Stat. 182), the President was given vast war powers to commandeer<sup>8</sup> ships,

<sup>8</sup> "The President is hereby authorized and empowered, within the limits of the amount herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material [or take possession, lease, or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation].

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interests therein; and To requisition and take over for use or operation by the United States any plant, or any part thereof, without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

(f) To take possession of, lease, or assume control of, or to extend, improve, or increase, or cause to be extended, improved, or increased, any street



plants, materials, and contracts; and it was further provided that

The President *may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.*

By Executive order (No. 2664) dated July 11, 1917, the President (1) *delegated to the Fleet Corporation* all the power and authority vested in him by the

railroad, interurban railroad, or part thereof, wherever operated, and all cars, appurtenances, and franchises or parts thereof commonly used in connection with the operation thereof necessary for the transfer and transportation of employees of shipyards or plants engaged, or that may hereafter be engaged, in the construction of ships or equipment therefor for the United States.]

(g) *In pursuance of the foregoing powers, or any of them, to make advance payments or loans of such amounts and upon such terms as the President may deem necessary and proper.*

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such orders shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities, or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship charter, material, or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient. \* \* \*

The word "plant" shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard, *dry dock, marine railway, pier, or dockyard* and discharging terminal ~~or other facilities connected therewith~~, and any facilities or improvements connected with any of the foregoing descriptions of property."

These powers were increased by the acts of April 22, 1918 (40 Stat. 535); words added are shown in square brackets [ ]; and November 4, 1918 (40 Stat. 1022) words added are indicated by *italics*, and words stricken out by a rule through them; and such increased powers were delegated to the Fleet Corporation by Executive orders of June 18, 1918, and December 3, 1918.

above act relating to the purchase, construction, or requisition of ships, contracts, or materials for ship construction; and (2) delegated to the Shipping Board all his authority over completed vessels, their disposition, or the operation thereof, and *authorized the Shipping Board to exercise such authority through the Fleet Corporation.\**

2. By joint resolution (40 Stat. 75) and Executive orders thereunder (Nos. 2651, 2653), about 90 German ships were seized in American ports, turned over to the Shipping Board for equipment and operation, and it, in turn, acting under Executive Order No. 2664, dated July 11, 1917, delegated the President's powers of operation of such ships to the Fleet Corporation (1st Annual Report, p. 11).

3. By the housing act of March 1, 1918 (40 Stat. 438), the Fleet Corporation was directly authorized to purchase, requisition, or condemn (a) any houses for shipyard employees and (b) any land suitable for the erection of such houses thereon, and to erect such houses; \$50,000,000 was appropriated therefor and the Fleet Corporation was to report directly to Congress.

4. By the shipyard transportation facilities act of April 22, 1918 (40 Stat. 535), the President was authorized to seize, extend, and operate any street railways and the equipment thereof; and by Executive order (No. 2888) dated June 18, 1918, the President delegated to the Fleet Corporation all his powers under that act.

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\* The authority to "operate" was not only in excess of, but in positive violation of, the Shipping Act of 1916, which proves that the Fleet Corporation's powers came anew from Congress and did not rest on the Shipping Act of 1916.

5. By an act of July 11, 1918 (40 Stat. 888), the land-condemnation act of July 2, 1917 (40 Stat. 241), was extended to include whatever was necessary to supply timber products to the Fleet Corporation, which was authorized to condemn "in the name of the United States" any property needed for dry docks, vessels, housing for employees, etc.

6. By an act of November 4, 1918 (40 Stat. 1022), amending the original emergency shipping act of June 15, 1917, the President's powers of building, extending, and commandeering were greatly increased and also made to include dry docks, marine railways, and piers; and in pursuance thereof to make such advances and loans, as the President deemed proper, and by Executive order thereunder dated December 3, 1918 (No. 3018), the President expressly delegated such powers to the Fleet Corporation.

7. By Executive order (No. 3018) dated December 3, 1918, the President, first, *delegated to the Fleet Corporation all the power and authority which various acts had vested in him that were "directly or indirectly applicable to ship or plant construction"*; second, authorized the Shipping Board to delegate to the Fleet Corporation its power regarding completed vessels, dry docks, etc., or the operation thereof; and, third, ratified all that the Fleet Corporation had done in those respects which the President might have done.

8. By Executive order (No. 3063) dated March 12, 1919, the President ratified various acts of the Fleet Corporation undertaken at his request respecting the

construction of Mississippi River barges and towboats and its transfer of \$3,860,000 from the shipping fund to the War Department.

9. By an act of July 19, 1919 (41 Stat. 181), the President was authorized to dispose of all stores, supplies, ship equipment, buildings, dry docks, shipyards, etc., acquired by the Fleet Corporation; and by Executive order (No. 3145) dated August 11, 1919, he directed the Shipping Board directly, or at its discretion through the Fleet Corporation, to sell or otherwise dispose of all such property of the Fleet Corporation as shall be to the "best advantage of the United States."

10. By an act of October 14, 1919 (41 Stat. 305), the provisions of the Revised Statutes regulating steam vessels were made applicable to vessels operated by the Fleet Corporation—clearly evidencing that, as United States vessels, they would not otherwise be subject thereto.

11. The Merchant Marine Act, 1920 (41 Stat. 988) recognized the fact that all of the Fleet Corporation's activities had been of a purely governmental nature and that all of the products of its activities belonged exclusively to the United States. That act provided that all vessels, property, and other interests of whatsoever kind, which had been acquired by the President "through any agencies whatsoever" under the authority granted him by the great war legislation therein specified, should be transferred to the Shipping Board; that the life of the Fleet Corporation should continue with authority in it to operate

vessels until the Shipping Board should sell all vessels under the provisions of the merchant marine act, 1920; and thereby repealed the provisions of the Shipping Act, 1916, in so far as it (1) limited the Fleet Corporation's life to five years after the conclusion of the European War and (2) prohibited it from operating vessels.

If the Fleet Corporation were a private corporation, of course Congress would have had no right to take from it any of its corporate property and it could only transfer the possession or title from the Fleet Corporation to the Shipping Board because of the fact that the Fleet Corporation never functioned or had any life except as an instrumentality of the United States, and because all its property belonged to the United States.

Not only that, but the Merchant Marine Act, 1920, vested in the Shipping Board vast powers in connection with the merchant marine and world commerce, the details of which it is unnecessary to specify. By this act Congress further provided (41 Stat. 1007).

That the *power and authority* vested in the Board by this act, except as herein otherwise specifically provided, *may be exercised* directly by the Board, or by it *through the United States Shipping Board Emergency Fleet Corporation*.

This is another and final recognition of the Fleet Corporation as a direct instrumentality of the Federal Government, which may be used (and in many respects is now being used) to establish an American Merchant Marine; to sell the shipping property of the

United States, which had cost billions of dollars; to establish trade routes and operate vessels thereon; to investigate water-borne commerce in all its aspects; to take over the German port facilities; to make rules and regulations governing shipping and foreign trade; and generally to carry out the vast powers over ocean traffic therein created.

It is thus seen that Congress conferred on the Fleet Corporation, as an instrumentality of the United States, the great war powers to requisition ships, plants, materials, and contracts; to operate captured German vessels; to condemn lands and houses and to erect houses for employees; to seize, operate, and build street railways; to condemn timber lands; and to sell and dispose of United States property, for the acquisition of which Congress had given the Fleet Corporation over \$3,300,000,000.

The foregoing recital of the vast war powers conferred upon the Fleet Corporation is all that is needed to demonstrate that it was an instrumentality of the Federal Government in the execution of great operations essential to the prosecution of the war.

**THE FLEET CORPORATION EXECUTED THE WAR POWERS  
OF CONGRESS.**

1. On July 11, 1917, the President exercised his power of delegation and provided (Executive order No. 2664):

I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise *all power and authority vested in me* in said section of said act, in so

far as applicable to and in furtherance of the *construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.*

By subsequent Executive orders the President delegated to the Fleet Corporation other vast and far-reaching war powers, which Congress had given him and authorized him to delegate to any agency he chose to select (Orders Nos. 2888, 3018, 3063, 3145, dated June 18, December 3, 1918; March 12, August 11, 1919).

On August 3, 1917, the Fleet Corporation, by letter and telegram, notified practically every shipyard in America (later supplemented to include all) that—

by virtue of [the war act of June 15, 1917 (40 Stat. 182)] and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive order of the President dated July 11, 1917—

all ships above 2,500 tons then under construction in their yards, and all materials, etc., for the completion thereof,

are hereby requisitioned *by the United States.*

*On behalf of the United States, by virtue of said act, and said order, you are hereby required to complete the construction of said*

requisitioned ships under construction and will prosecute such work with all practicable dispatch \* \* \*. You \* \* \* will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

By this action the United States took and kept title to every ship (about 431) then building or contracted to be built in this country. (Hearings before Senate Committee on Commerce, 65th Cong., 2d sess., on S. R. 170, p. 228; Hearings before Senate Committee on Commerce, 66th Cong., 1st sess., on American Merchant Marine, June, 1920, p. 1862; Report of Commissioner of Navigation, Department of Commerce, 1918, p. 227; Report of Bureau of Shipping Information, Division of Operations, United States Shipping Board Emergency Fleet Corporation, dated Dec. 18, 1918; S. Doc. 315, 65th Cong., 3d sess.; Hearings before Senate Committee on Commerce, 65th Cong., 2d sess., on S. R. 170, pp. 130-143.)

In pursuance of that authority, the Fleet Corporation contracted for the construction of 2,843 steel, wood, composite, and concrete ships, barges, and tugs with 15,367,070 estimated dead-weight tons, and expended thereon \$2,311,111,520.30; requisitioned 415 ships of 2,945,906 dead-weight tons on the ways and completed them at an expenditure of \$552,032,973.75, or a total of 3,258 vessels, on which it spent \$2,863,144,494.05, all of which was furnished



by Congress, and the property so acquired belonged exclusively to the United States.

2. In the execution of that enormous war program to furnish the ships vitally needed, as above explained, the Fleet Corporation, acting sometimes as the statutory delegate of the President, and again as the direct delegate of Congress, in two years increased the country's shipyard facilities from 61 yards with 215 ways to 223 yards with 1,122 ways, including the vast Hog Island project, where work could be done on 78 ships at one time; there were employed 267,575 men on steel ships alone, or 385,217 men in all; it established schools of instruction for shipyard workers; it built whole villages for its workmen, including 8,644 individual houses, and great numbers of dormitories, apartments, hotels, boarding houses, cafeterias, and streets; it financed public utilities for those houses; it requisitioned hundreds of houses under its war powers; under the power to requisition transportation facilities it provided, in one way or another, such facilities for the shipyard workers; it had constructed dry docks, piers, marine railways, and terminal facilities; on August 3, 1917, it commandeered every steel ship over 2,500 dead-weight tons under construction in this country—415 ships of 2,945,906 dead-weight tons; it contracted for 34 ships to be built in Japanese and Chinese shipyards; and it recruited and trained thousands of ship officers and seamen.

3. Under direction of the Shipping Board the Fleet Corporation also acted as delegate of the President in

the operation of ships after they were constructed; it assigned vessels to other governmental agencies and allied nations; it requisitioned vessels on the Great Lakes and brought them to the seaboard for use; and it supplied ships to carry troops and supplies to Europe.

4. On November 1, 1918, not less than 598 Fleet Corporation owned or chartered vessels, 4,269,838 dead-weight tons, were in the service of the Army and Navy.

The Fleet Corporation spent vast sums for the benefit of the Army and Navy, which by special legislation were relieved from repaying them. (Merchant marine act, 1920, sec. 15, 41 Stat. 993; act of July 11, 1919, 41 Stat. 148.)

Before the armistice, the United States sent to *Europe* 2,024,100 troops and 4,968,976 tons of supplies, but only 12 per cent of the troops and a little over half of the supplies were carried in ships built, owned, or requisitioned by America; while we had to rely on *foreign*-owned ships to carry 88 per cent of our troops (1,178,669) and nearly half of our supplies to the theater of war.

But after the armistice, the Fleet Corporation's program began to be felt.

Of the 2,052,989\* troops brought back *from Europe* after the armistice, 86 per cent were brought back in ships secured through the Fleet Corporation, of which 63 per cent were owned by the United States.

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\* This included many troops which were sent over *after* the armistice and also certain troops not included in the figures just given.

This showing was principally due to the Fleet Corporation's activities.

5. The above is but a partial outline of the Fleet Corporation's great Federal activities as disclosed in the United States Shipping Board's Annual Reports for 1917-1921; Report of the War Trade Board, pp. 7, 109-119; Report of Secretary of War, 1918, pp. 26-31.

#### SUMMARY OF POINTS DISCUSSED.

1. The Fleet Corporation is a valid instrumentality, and agent of the United States Government; and all of its contracts and acts here involved were, respectively, made and performed, not in its own corporate interest, but exclusively for the United States in the execution of the war powers of Congress (p. 35 *infra*).

2. The Fleet Corporation has no personal interest in these controversies; and it is not suable, because the suits are, in effect, suits against the United States, which is the real party in interest. The United States has never consented to be sued, its property rights would be directly affected if the relief sought were granted; and in the Sloan Shipyard Case it is an indispensable party (p. 53 *infra*).

3. An analysis of, and reply to, the arguments advanced by the several District Courts which have held that the Fleet Corporation is suable as a private corporation (p. 86 *infra*).

4. The Fleet Corporation is entitled to a priority of payment in the Eastern Shore Case, as its claim is a "debt due to the United States" (p. 100 *infra*).

## FIRST POINT.

The Fleet Corporation is a valid incorporated instrumentality and agent of the United States Government; and all of its contracts and acts here involved were, respectively, made and performed, not in its own corporate interest, but exclusively for the United States in the execution of the war powers of Congress.

1. *The Fleet Corporation is an instrumentality of the United States.*—The constitutionality of the Shipping Act, 1916, and of the incorporation of the Fleet Corporation thereunder is not even questioned, because under the general power to declare and conduct war, to provide and maintain a navy, to apply public moneys for the common defense and general welfare, and to regulate commerce, Congress had the undoubted authority to create the Fleet Corporation under the laws of the United States as an appropriate means through which to execute those powers. (*McCulloch v. Maryland*, 4 Wheat. 316, 407, 411, 414, 415, 419, 421-2; *Osborn v. U. S. Bank*, 9 Wheat. 738, 860-863; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 530; *California v. Pacific R. Co.*, 127 U. S. 1, 39; *1st Nat. Bk. v. Union Trust Co.*, 244 U. S. 416, 425; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 208-211.)

Pursuant thereto, Congress *first* authorized the President to delegate to the Fleet Corporation (which he did) these tremendous war powers of the Government which Congress had vested in him for the construction, requisition, condemnation, and comman-

deering of ships, drydocks, timber lands and products, materials, plants, transportation facilities and contracts therefor (p. 23, note, *supra*) ; and, later, directly delegated to the Fleet Corporation the power (a) to carry out the shipyards' employees housing plan and to report directly to Congress (p. 25, *supra*; 40 Stat. 438), and (b) to condemn and to acquire land and timber interests (Id. ; 40 Stat. 888) ; and, *secondly*, appropriated as a part of the "war expenses" over \$3,300,000,000 of public moneys (raised by the taxing and borrowing powers) to be spent by the Fleet Corporation in the execution of the powers so conferred (p. 22, *supra*).

The Fleet Corporation exercised those delegated powers and spent that vast sum of money in the execution of the immense program of war-time ship construction (and the allied activities necessarily incident thereto), summarized at p. 30-34, *supra*; and in so doing the Fleet Corporation was engaged in the active, affirmative, and, indeed, exclusive execution of the express war powers of Congress.

The bare statement of those facts demonstrates that the Fleet Corporation was a national agency and an instrumentality of the United States for a public purpose, to wit, to secure ships for the Government essential to the prosecution of the Great War.

In many cases corporations have been held to be instrumentalities of the Federal Government and, as such, exempt from even the great reserved powers of the States, of which some recent examples are *Farmers Nat. Bk. v. Dearing*, 91 U. S. 29, 33, 34;

*Easton v. Iowa*, 188 U.S. 220, 230, 237; *Farmers Bk. v. Minnesota*, 232 U.S. 516, 524, 525; *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292, 298; *Indian Oil Co. v. Oklahoma*, 240 U.S. 522, 530; *Bk. of California v. Richardson*, 248 U.S. 476, 483; and *Smith v. Kansas City Title Co.*, 255 U.S. 180, 210, 211. In none of them did the relation of the instrumentality to the execution of Federal powers begin to approach in directness or in exclusiveness of purpose the immediate relation of the Fleet Corporation to the exercise of Congress's power to declare war and to regulate commerce.

For instance, in *Smith v. Kansas City Title Co.*, 255 U.S. 180, it was held that a joint-stock land bank owned and operated exclusively by private individuals for their own private profit, and prohibited from engaging in the business of banking in any ordinary sense, but making loans of private capital on farm lands, was nevertheless an instrumentality of the United States—with its private mortgages and bonds actually exempt from all State taxation—and all because of the fact that Congress had authorized such institutions to act in a limited sense as depositaries of public money and as financial agents of the Government. It was earnestly contended in that case that as those banks had never acted either as depositaries or agents of the Government, Congress could not make them instrumentalities of the United States so as to exempt them from State control as to their principal business of farm mortgage lending, by the mere device of bestowing upon them a possible potential power to

act as depositaries or financial agents, considering the adequate existing powers of the national banking system to do those things. But this court held that it was immaterial whether the banks actually exercised the powers or not; and that as long as Congress had chosen to confer on them such powers, which might at some time be used for governmental purposes, they were instrumentalities of the United States and exempt from State taxation.

If these joint-stock land banks are instrumentalities of the Federal Government (although wholly owned and operated for private profit, and whose principal business has no Federal relation whatever) because endowed with the power to act for the United States in quite another and incidental respect, *a fortiori* the Fleet Corporation is a national agency and Federal instrumentality because its entire business has been, not to do anything for private profit, or even for its own profit as a corporate entity, but only to build ships, etc., which were directly and indispensably necessary to be done, in accordance with the express delegation by Congress, in order that the Fleet Corporation should carry into execution the express power of Congress to conduct war.

It should be observed that in the above argument no reliance has been placed on the fact that the United States was the *sole stockholder* of the Fleet Corporation; and this is because, in determining whether or not a given corporation is an instrumentality of the United States, it is not material whether the United States owns *all* of the stock (*Smith v. Kansas City*

*Title Co.*; *Ballaine v. Alaska North. Ry. Co.*, 259 Fed. 183), none of the stock (*Farmers Nat. Bk. v. Dearing* (91 U. S. 29), *Luxton, California v. Pac. R. Co.* and *Union Trust Co.* cases), or only a portion of the stock (*McCulloch* and *Osborn* cases); but the United States complete ownership of the stock may fairly be adverted to as indicating that the United States desired to have, and has, absolute and complete control over the instrumentality to which it has confided the execution of such vast governmental powers.

2. *The Fleet Corporation's contracts and acts were not undertaken in its corporate interest, but solely on behalf of the United States and at its direction.*—A. The *Astoria case*, No. 376, is a plain suit at law for \$428,053.74 damages for the Fleet Corporation's alleged breach, i. e., renunciation, of a written contract, dated February 1, 1919, by which the Fleet Corporation, described as "representing the United States of America," agreed to furnish certain money to the Astoria Co. to enable the latter to construct a marine railway, repair plant, piers, etc. (R. 13, 14.)

Neither the shipping act, 1916, the emergency shipping fund act of June 15, 1917, nor any other legislation, contained any provision for acquiring marine railways, dry docks, etc.; and experience having shown that the provisions of the act of July 18, 1918 (40 Stat. 915, § 13), authorizing the President to purchase, lease, or requisition dry docks, etc., were inadequate to secure proper terminal facilities, Congress, by an act of November 4, 1918 (40 Stat. 1022), amended



the emergency shipping fund act of June 15, 1917 (40 Stat. 182), so as to give to the President the *new and additional power*

"to construct, *establish* or extend" any "dry dock, marine railway, pier, and any facility or improvement connected with any of the foregoing descriptions of property" (Cf. 40 Stat. 1022, I and IV with 40 Stat. 182, 183; 3rd Annual Report, p. 54; 4th Annual Report, pp. 87-91),

and also

In pursuance of the foregoing powers, or any of them, *to make* advance payments or *loans* of such amounts and upon such terms as the President may deem necessary and proper (40 Stat. 1022).

By Executive Order No. 3018, dated December 3, 1918, the President after reciting the extension of his war powers by several acts, including the act of November 4, 1918, expressly *delegated* to the Fleet Corporation—

*all power and authority now vested in me* by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or *plant* construction,

which word "plant" was expressly *defined* to include "dry dock, *marine railway*, pier, and any *facilities* or improvements connected with any of the foregoing descriptions of property" (40 Stat. 183, 1022).

By the act of November 4, 1918, and that Executive order thereunder, the Fleet Corporation was, for the first time, delegated the power to *establish*

drydocks, marine railways, piers, etc., and to make loans in furtherance thereof. In the exercise of those powers, thus directly delegated by the President to the Fleet Corporation, it, "*representing the United States of America*," made the contract sued on, by which the Fleet Corporation agreed to lend the Astoria Co. the money with which to construct a marine railway, repair plant, etc. (R. 14.)

Neither the Shipping Act 1916 nor the laws of the District of Columbia authorized the Fleet Corporation to exercise such powers; and its power to contract with the Astoria Co. in these matters rested solely on the delegation of power from the President.

The plaintiff, Astoria Co., claims that the Fleet Corporation breached the contract by failing to furnish the funds as promised, and thereby (1) rendered valueless the work partially performed by the Astoria Co., which had no money to finish the work, and (2) deprived it of \$275,000 profits it would have made if it could have completed the plant and operated it.

No argument is necessary to show that the Fleet Corporation in making that contract was not acting in pursuance of any general corporate power for its own private benefit, but was acting solely and exclusively, on behalf of the United States, and as the delegate of the President's war powers conferred upon him by Congress, to be exercised by such agencies as he might select in prosecution of the war.

B. The *Sloan Shipyards Case*, No. 308, is a suit in equity seeking (1) an injunction, (2) a decree for the cancellation of a mortgage, (3) an accounting of

profits under a contract, and (4) the restoration of certain seized property—all arising out of the following alleged acts of the Fleet Corporation, to wit (R. 21-33):

(1) The Fleet Corporation's seizure of the Sloan Shipyards' plant and supplies on December 1, 1917, and the use thereof since that date. (R. 24-25.)

(2) The Fleet Corporation's subsequent cancellation of certain contracts which the Sloan Shipyards had previously made with third parties for timber and shipbuilding supplies. (R. 25-26.)

(3) A contract dated May 1, 1918, and a mortgage and bond dated July [17], 1918, executed by the Sloan Shipyards to the Fleet Corporation "*representing the United States of America.*" (R. 41, 50-51.)

By whom were those alleged acts committed? By the United States alone.

(1) The seizure and use of the shipyard and supplies was the act of the United States Government, done through the instrumentality of the Fleet Corporation as the delegate of the President's war powers, expressly conferred on him by Congress by the emergency shipping fund act, which expressly authorized such seizure and use. The President was authorized (40 Stat. 182)—

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has, or has not, any contract or agreement with the owner or occupier of such plant.

(e) To \* \* \* requisition, or take over \* \* \* the possession of, for use or operation by the United States any ship now constructed or in process of construction or hereafter constructed, or any part thereof \* \* \*.

That power was sufficient to authorize the seizure of the Sloan Shipyards plant. But there were additional powers granted under which its seizure might have been had, to wit (40 Stat. 182):

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order \* \* \*.

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war, and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

In order to compel compliance with such orders, it was further provided that (40 Stat. 182)—

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given \* \* \*. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith \* \* \*, the President *may take*

*immediate possession* of any ship, charter, material, or plant of such person, or any part thereof, without taking possession of the entire plant, and *may use the same* at such times and in such manner as he may consider necessary or expedient.

The President was expressly authorized to, and did, delegate to the Fleet Corporation those powers (p. 24, 29 *supra*); and it was under them that the Fleet Corporation on December 1, 1917, seized and subsequently operated the Sloan Shipyards property.

(2) In exactly the same way, the Fleet Corporation canceled the Sloan Shipyards' outstanding contracts, under the power given to the President (40 Stat. 182)—

(b) To modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships or material.

(3) The contract of May 1, 1918, and the bond and mortgage thereunder, were executed by, or made to, the Fleet Corporation, not in its own corporate capacity, but to it as "*representing the United States of America*," by which phrase it was expressly described (R. 41, 50).

C. The *Eastern Shore* case, No. 526, presents the Fleet Corporation's contention that its \$328,017.72 allowed claim in bankruptcy against the Eastern Shore is entitled to priority of payment out of the bankrupt's assets under the bankruptcy act, § 64, and R. S. § 3466, giving priority to "*debts due to the United States*," because the debt is owing under

a contract between the Eastern Shore and the Fleet Corporation "*representing the United States of America*," which contract was made by the Fleet Corporation solely as the delegate of the President's war powers, as heretofore explained.

D. In *Hodgson v. Dexter*, 1 Cranch, 345, a certain house was leased to Samuel Dexter, "Secretary of War," who covenanted for himself and his successors to keep the premises in repair. Suit was brought against him for a breach of that covenant. It was held that as Congress had required the President to move the public offices from Philadelphia to Washington, and the Secretary of War had, in order to provide a War Office, leased the building, he was acting, not for himself, but for the Government, and that there was no claim against him. CHIEF JUSTICE MARSHALL (S. C.) said (p. 363):

It is too clear to be controverted that where a public agent acts in line of his duty and by legal authority his contracts made on account of the Government are public, not personal. They inure to the benefit of, and are obligatory on, the Government; not the officer. A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The Government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public officer, if he should be made personally responsible for contracts on the public account \* \* \*. It is admitted that the house was taken on account of the public, in pursuance of the proper authority; and

that the contract was made by the person at the head of the department for the use of which it was taken; nor is there any allegation, not is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the Government, or that he was unwilling to contract on the faith of the Government. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the Government. The official character of the defendant is stated in the description of the parties \* \* \*. The court is unanimously and clearly of opinion that this contract was entered into entirely on behalf of the Government by a person properly authorized to make it, and that its obligation is on the Government only.

See also *Sheets v. Selden's Lessee*, 2 Wall. 177-187; *District of Columbia v. Camden Iron Wks*, 181 U. S. 453-460. *Belknap v. Schild*, 161 U. S. 10, 17, and cases there cited. *Parks v. Ross*, 11 How 362, 374; *Jones v. Le Tombe*, 3 Dall 383; *Garland & Davis*, 4 How 131, 148.

Whatever the Fleet Corporation did, either in signing the contracts with the Astoria Co., the Eastern Shore, and the Sloan Shipyards, or in seizing the latter's plant, or in cancelling its contracts with third parties, was done by it just as the same acts might have been done by any individual acting as the delegate of the President's war powers, pur-

suant to the express authorization by Congress, which had vested such powers in the President and then empowered him to exercise such powers "through such agency or agencies as he shall determine from time to time." (40 Stat. 183.)

E. It is unnecessary to consider what the precise status of the Fleet Corporation would have been, had it acted solely under its corporate powers as limited and defined by the Shipping Act, 1916. The Fleet Corporation was not organized until *after* the United States had entered the War, and did not function otherwise than as the delegate of the President under the emergency war legislation, until after the passage of the Merchant Marine Act, 1920 (41 Stat. 988). It was not until after the declaration of war, and in response to the President's appeal for ships (p. 21 *supra*), that the machinery of the Shipping Act, 1916, was utilized to create the Fleet Corporation as an instrumentality that might be used to execute the war powers of Congress.

The Fleet Corporation acquired, just as any private individual<sup>9</sup> would have acquired, a special

<sup>9</sup> Illustrations of great war powers delegated by the President, not to corporations but to *individuals*, are found in his delegation (1) to the Secretary of the Navy of all power vested in the President by the act of June 15, 1917, "in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and \* \* \* of the production, purchase, and requisition of materials \* \* \* for the use of the Navy" (Executive order of Aug. 21, 1917); (2) to Harry A. Garfield, Food Administrator, to carry out the provisions of the food-control act of Aug. 10, 1917, 40 Stat. 276, in so far as the same apply to fuel (Executive order of Aug. 23, 1917); (3) to Herbert Hoover, Food Administrator, "to requisition any and all foods and feeds and storage facilities for the same that said Herbert Hoover, United States Food Administrator, deems are necessary for any public use connected with the common defense" under the food-control act (Executive order of Oct. 23, 1917); and (4) to Wm. G. McAdoo, as Director General of Railroads, of the power to take over and operate the railroads of the country (Proclamation of the President, Dec. 26, 1917).



status as a Federal instrumentality, when the President, under the act of June 15, 1917, and subsequent legislation, delegated his war powers to it.

This is obvious when it is observed that neither the Shipping Act, 1916, the District of Columbia corporation laws, nor the Fleet Corporation's certificate of incorporation (R. 34) authorized it (1) to *condemn* land or houses for employees, (2) to *build houses* (40 Stat. 438), (3) to take possession of, lease, or assume control of *street railways or interurban railroads* (40 Stat. 535), (4) to *extend or improve* such street railways or interurban railroads (40 Stat. 1022), (5) to *condemn* lumber camps, sawmills, standing timber, rights of way, etc. (40 Stat. 888), or (6) to *requisition* dry docks, marine railways, discharging terminals, etc. (40 Stat. 1022)—all of which powers were conferred on the Fleet Corporation by Congress, either directly or by delegation of the President.\* It was under these delegated powers that the Fleet Corporation performed or committed each of the acts which are made the basis of the present suits.

F. If the facts recited in Paragraphs A, B, C, D, and E do not demonstrate that the Fleet Corporation's acts involved in this litigation were not acts of an ordinary private corporation in which the United States was the sole stockholder, but were the acts of a national instrumentality (in which the United States ownership of the capital stock was, if not accidental, at least only a perhaps inducing cause for the selection of that particular corporation as such instrumentality), which, independently

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\* See footnote p. 25 *supra* for a striking illustration.

of any corporate powers which it might have technically possessed under its original charter, was selected by Congress and the President as a Federal instrumentality and then newly endowed with all of the powers necessary to carry into execution the war powers of the Government, then no amount of argument can do so.

It is neither the United States ownership of the capital stock, nor the powers conferred by the Shipping Act, 1916, the District of Columbia corporation laws, nor the certificate of incorporation, on which the governmental nature of the Fleet Corporation depends, but it rests solely upon its adoption as a Federal instrumentality by Congress and by the President under the war legislation and the Executive orders thereunder.

3. *Congressional recognition of the Fleet Corporation as a governmental department.*—Congress has, in various ways, recognized that the Fleet Corporation, at least in its existence and operations as delegate of the war powers of Congress, is but a governmental bureau, and not a private corporation in the ordinary sense.<sup>10</sup>

<sup>10</sup> Congress regulated cost-plus contracts and required the Fleet Corporation to report annually to Congress many details of its work (40 Stat. 439); directed the Secretary of the Treasury to audit its financial transactions (Id. 651); prohibited cost-plus contracts (41 Stat. 181); authorized the President to dispose of, as he might direct, any stores, supplies, ship equipment, factories, warehouses, buildings, shipyards, etc., acquired by the Fleet Corporation (Id.) which it could only do on the assumption that all the property acquired by the Fleet Corporation was really Government property and therefore within the power "to dispose of \* \* \* property belonging to the United States" (Const. Art. IV, Sec. 3 c 2); prohibited its funds from being used for rental of buildings in the District of Columbia (41 Stat. 891); prohibited it from building new vessels, though its charter

The Fleet Corporation has created under the delegation of war power and by express authority of Congress vast liabilities to many claimants, probably in the hundreds of millions of dollars (although the Shipping Act, 1916, §13, limited the liability that could be incurred thereunder to \$50,000,000), and has no assets with which to pay them, except as Congress may appropriate the money therefor, which it has been doing, and will no doubt continue to do.<sup>11</sup>

On September 30, 1921, the debts of the Shipping Board and the Fleet Corporation were \$58,741,087.50, owing to 2,544 persons; and in addition there were 3,368 claims, amounting to \$292,155,843.05, or a total of \$350,000,000 liabilities. (See Senate Document No. 103; 67th Cong., 2d sess.)

Does anyone imagine that the seven individuals composing the Shipping Board are personally liable for that vast sum? If not, why is the Fleet Corporation liable? Or if the Fleet Corporation is liable as a private corporation, with no assets on hand, then the creditors would have no claim in the Court of Claims against the United States.

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and the Shipping Act, 1916, authorized it (Id. p. 891, 1383); asserted title to, and divested the Fleet Corporation of, all title to every kind of property acquired by the President under the Emergency Shipping Fund Act of June 15, 1917, as amended by the acts of April 22, July 18, and November 4, 1918 (41 Stat. 990, sec. 4), and transferred the proceeds of any Fleet Corporation activities (even under the Shipping Act 1916, if any there had been) to the United States Treasury (41 Stat. 993); and limited the salaries the Fleet Corporation might pay its employees (act Aug. 24, 1921, Pub. No. 69).

<sup>11</sup> A very complete history of the affairs, financial and otherwise, of both the Shipping Board and the Fleet Corporation will be found in Hearings before the House Committee on Appropriations on the "Independent

It should be borne in mind that the Fleet Corporation, while technically incorporated under the laws of the District under the authority of the Shipping Act, 1916, was a mere empty shell and never received its \$50,000,000 capital until after the President had delegated to it his war powers (*Eastern Shore Case*, R. 36-37); that the capital was all spent in administration expenses, and that whatever property it ever acquired, or now has, was acquired from appropriations made to carry out the war power delegations of Congress and the President, and is exclusively the property of the United States.

The Merchant Marine Act, 1920, was declaratory of the situation then existing. The Fleet Corporation could not acquire any beneficial or proprietary interests in any property obtained as the delegate of the President's war powers or as an agency of the United States. It could only hold the property in trust for the United States. Hence, the provisions of the Merchant Marine Act, 1920, Sec. 4 (41 Stat. 990).

*That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agency whatsoever \* \* \* are hereby transferred to the [Shipping] Board,*

which is then, §5, directed to sell the vessels as soon as practicable, are a recognition and assertion by

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Offices Appropriation Bill, 1923," 67th Cong., 2d sess., pp. 798-1175; and before the Senate Committee on Appropriations on H. R. 9981, 67th Cong., 2d sess., pp. 32-47; see also Hearings on the Urgent Deficiency Appropriation Bill, 1922, before the respective House and Senate Committees on Appropriations, 67th Cong., 1st sess., relating to the United States Shipping Board .

Congress of the United States' ownership of all the property so acquired; and constitute a transfer of the management and disposition thereof from one governmental agency to another. The President's power to delegate authority to the Fleet Corporation was revoked (§2, p. 988), but the Shipping Board was authorized to exercise its powers under the act, either directly or through the Fleet Corporation (§35, p. 1007).

In short, if the Fleet Corporation had ever acquired any property in its corporate capacity, such property and the Fleet Corporation's ownership thereof were not affected by the 1920 Act; but, by that act, Congress clearly differentiated between the property, if any, acquired by the Fleet Corporation in its corporate capacity and that acquired by it as the delegate of Congress or of the President. The latter was removed from the scope and operation of the delegated agency of the Fleet Corporation. The United States asserted title thereto and gave the power of management and disposition to the Shipping Board.

When it is remembered that all the Fleet Corporation's activities with respect to the Sloan Shipyards, the Astoria Co., and the Eastern Shore Corporation were undertaken and carried on exclusively as the delegate of Congress's war powers for the benefit, and only for the benefit, of the Government, out of which the Fleet Corporation could derive for its corporate self neither property nor profit, it seems too plain for further argument that in connection with the litigations now under consideration, it was not in any sense

acting in its corporate capacity, but merely as a direct agency of the United States.

## SECOND POINT.

The Fleet Corporation has no personal interest in these controversies; and it is not suable because the suits are, in effect, suits against the United States, which is the real party in interest; the United States has never consented to be sued, its property rights would be directly affected if the relief sought were granted; and, in the Sloan Shipyards case, it is an indispensable party.

1. That the Fleet Corporation has no personal corporate interest in these controversies, which all relate exclusively to acts as delegate of the President's war powers, has been sufficiently shown (pp. 39-49, *supra*).

2. The question is whether, under the principles laid down by this court in prior cases, suits of this kind are suits *against* the United States?

It is elementary that the United States can not be sued without its consent given by Congress (11 Encyl. U. S. Sup. Ct. Reports 796 and cases there collated; *Louisiana v. McAdoo*, 234 U. S. 627, 628; *Louisiana v. Garfield*, 211 U. S. 70, 78; *Kawananakoa v. Polyblank*, 205 U. S. 349, 353; *U. S. v. Lee*, 106 U. S. 196, 207; *Porto Rico v. Rosaly*, 227 U. S. 270, 274).

Whether the suit is one against the United States is determined, not by the fact of the party named as defendant on the record,<sup>12</sup> but by (1) the question of the

<sup>12</sup> The old rule that the question was to be determined by the party named as defendant (*Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203) has been changed (*In re Ayers* 123 U. S. 443; *Minnesota v. Hitchcock*, 185 U. S. 373, 386).

effect of the judgment or decree which can be rendered, and (2) whether the United States is the real party in interest (*Louisiana v. McAdoo*, 234 U. S. 627, 629; *Kansas v. U. S.*, 204 U. S. 331, 341; *Oregon v. Hitchcock*, 202 U. S. 60, 68; *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 386, 387).

In determining whether a given suit is really one against the United States, exactly the same rules apply as obtain in determining whether a suit is against one of the several States.<sup>13</sup> (*Kansas v. U. S.*, 204 U. S. 331, 341; *Tindal v. Wesley*, 167 U. S. 204, 213.)

3. In the present cases it should be noted:

(1) The United States is the *real party* in interest because (a) in the *Astoria Co. Case* a money judgment is asked against the Fleet Corporation as damages on a contract which it made as delegate of the President and in which it described itself as "*representing the United States of America*" (R. 14); and any judgment recovered, if ever paid, could only be paid out of a congressional appropriation; (b) in the *Sloan Shipyards Case* the property sought to be impounded and restored is in the *possession* of the United States and was taken by seizure under requisition on December 1, 1917, and the mortgage sought to be canceled is also the *property* of the United States and was given to secure a \$1,000,000 bond (R. 44) running to the Fleet Corporation "*representing the United States of America*" (R. 50)

<sup>13</sup> Hereafter in speaking of suits against State officers, it will be impliedly understood that the argument is equally applicable to suits against United States officers.

under a contract also entered into "*representing the United States of America*" (R. 41); and (c) in the *Eastern Shore Case* the claim of the Fleet Corporation is for moneys due under a contract which it made "*representing the United States of America*" (R. 54) and the claim, while in the name of the Fleet Corporation, is for the United States, and priority of payment is demanded as a "*debt due to the United States*" (R. 4, 77, 91).

(2) The United States is an *indispensable party* because in the *Sloan Shipyards Case* the United States is in *possession* of all the property and the actual owner of the \$1,000,000 mortgage sought to be canceled, title thereto having been taken (if not already in it) by the Merchant Marine Act 1920 (40 Stat. 990, § 4); and it is inconceivable that a decree *changing possession* of property or canceling a mortgage can be rendered without the presence of the possessor of the property and the owner of the thing canceled. (*Niles Bement Pond Co. v. Iron Molders' Union*, 254 U. S. 77, 80, and cases therein cited; *Cunningham v. Macon, &c., R. Co.*, 109 U. S. 446, 456; *Bogart v. Southern Pacific Co.*, 228 U. S. 137, 147.)

(3) *The effect of the decree* in the *Sloan Shipyards Case*, if the plaintiff prevails, would be to *take away property* now lawfully in the possession of and owned by the United States (not in the possession of the Fleet Corporation, as its interest, if any, was all taken away by the Merchant Marine Act, 1920, and transferred to the Shipping Board) and restore it to another; to interfere with the United States selling



or disposing of such property; to cancel the mortgage now owned by the United States; and to prevent the United States from securing the money and bond on deposit in the Seattle banks which the Government claims to be entitled to or to have an interest in.

4. The cases involving the question whether the suit was really against the State or the United States (where neither was formally named as defendant), and hence not maintainable, fall naturally into two main classes, to wit, (1) those where the actual defendants were held *suable*, and (2) those where they were held *not* to be suable because the State or the United States was, in effect, the real defendant.

#### I. CASES WHERE THE DEFENDANTS WERE HELD SUABLE.

(1) This court has held that a suit may be maintained against an officer or agent of the State, and that it is *not* a suit against the State, in the following circumstances, none of which apply to the cases at bar, to wit:

(a) To enjoin a State officer from taking any threatened *future* action in the name of or for the State, under color of his office, to enforce, or in pursuance of, an *unconstitutional* statute (*Osborn v. Bank*, 9 Wheat. 738, 868; *Davis v. Gray*, 16 Wall. 203, 220; *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *Pennoyer v. McConnaughey*, 140 U. S. 1, 10, 12; *In re Tyler*, 149 U. S. 164, 190; *Scott v. Donald*, (2) 165 U. S. 107, 112; *Smyth v. Ames*, 169 U. S. 466, 519; *Proul v. Starr*, 188 U. S. 537, 543; *Ex parte Young*, 209 U. S. 123, 151-159; *Western Union v. Andrews*,

216 U. S. 165; *Ludwig v. Western Union*, 216 U. S. 146, 159, 163-4; *Herndon v. C. R. I. & P. Ry.*, 218 U. S. 135, 155; *Truax v. Raich*, 239 U. S. 33, 37; *Looney v. Crane Co.*, 245 U. S. 178, 191; *Terral v. Burke Construction Co.*, decided Feb'y. 27, 1922); and the suit is equally maintainable where the threatened *future* action is to enforce or carry out an unconstitutional *action* (for example, confiscatory) of a State officer proceeding under a *valid* statute (*Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 507; *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38; *Reagan v. Farmers L. & T. Co.*, 154 U. S. 362, 390; *L. & N. R. Co. v. Greene*, 244 U. S. 522, 528), provided of course, the threatened wrong be such as equity will enjoin; and the fact that the officer is threatening to commit the wrong in the name of the State and under the color of his office is of no significance whatever; for the *wrong* will be enjoined just as if he were acting in his individual capacity.

- (b) To enjoin a State officer (1) from doing a threatened *future* act (for example, canceling a patent, etc., which would cast a cloud on plaintiff's title) when such action was about to be taken through a *mistaken conception of his authority* (*Pennoyer v. McCornnaughy*, 140 U. S. 1; *Noble v. Union River Logging R.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 110; *Lane v. Watts*, 234 U. S. 525, 540; *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 238), and those cases are quite similar to the cases involving merely ministerial action presently to be noticed, or (2) from instigating criminal proceedings involving the same

legal questions as those presented in a pending equity suit for the protection of property rights (*Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 622).

- (c) To compel by *mandamus* the performance by a State officer of some plain, unmistakable, mere *ministerial duty*, prescribed by some special statute, and not affecting the general powers or functions of the Government, which unless performed would deprive the plaintiff of vested property rights. (*Ballinger v. Frost*, 216 U. S. 221, 230; *Roberts v. U. S.*, 176 U. S. 221, 230, 231; *Butterworth v. Hoe*, 112 U. S. 50, 68; *U. S. v. Schurz*, 102 U. S. 378, 395, 404; *Kendall v. U. S.*, 12 Pet. 524, 610-618; *Marbury v. Madison*, 1 Cranch 137; *arguendo* see *Ness v. Fisher*, 223 U. S. 683-694; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 452-453.)
- (d) To recover damages at law, for a *past* act of *tort* by a State official or instrumentality, done in good faith, in the name of the State under color of office, where the officer having no personal interest, was mistaken in thinking he had the lawful right to take the action he did (*Bates v. Clark*, 95 U. S. 204, 209; *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 310; *Mitchell v. Harmony*, 13 How. 114, 137; *Scott v. Donald*, 165 U. S. 58, 67-70; *Hopkins v. Clemson College*, 221 U. S. 636, 645; *Johnson v. Lankford*, 245 U. S. 541, 546; *Belknap v. Schild*, 161 U. S. 10, 18, 23, 26 as to the damages at law; *arguendo* see *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 452) and *a fortiori* where the official's act was arbitrary, capricious and in disregard of the law (*Johnson v. Lankford*, 245 U. S. 541, 546).

(e) To recover *specific property*, real or personal, because of the *present* wrongful action of a State official, in good faith, and under color of office, unlawfully withholding plaintiff's property under the erroneous belief that the laws of the State authorized such withholding (*U. S. v. Lee*, 106 U. S. 196; *Tindal v. Wesley*, 167 U. S. 204, 211, 218, 221-222; *Scranton v. Wheeler*, 179 U. S. 141, 152; *Poindexter v. Greenhow*, 114 U. S. 270, 288; *Osborne v. Bank*, 9 Wheat. 738, 844-845, 871), so far as recovery of \$100,000 was sought by the amended bill.)

It is believed that the foregoing classification embraces practically every case, certainly every important case, where suits have been held maintainable against State or United States officials; and none of them are in point here because *none of the three instant cases involves* any threatened *future* enforcement of an unconstitutional statute or unconstitutional action of a State officer under a valid statute, (a) *supra*; any threatened *future* action under a mistaken conception of authority (b) *supra*; any failure to perform some plain *ministerial* duty (c) *supra*; any *past* act of tort (d) *supra*; any *present* withholding of specific property under an erroneous belief that the State or Federal law authorizes such withholding (e) *supra*. "

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" If it be suggested that in the *Sloan Shipyard* case there is one allegation (R. 31) that the Fleet Corporation is threatening to foreclose a mortgage and to sell and dispose of certain assets (which is the only allegation in any of the three cases of any threatened *future* action of any kind whatsoever) it is sufficient to observe that such a single threatened *future* action is not, within the above cases, an instance of acting under a void statute or enforcing a valid statute in an unconstitutional manner. It is merely the discharge of ordinary official duties in the administration of the property in

The plaintiffs have not, in their briefs, relied on any of those cases, but lest the court should question their applicability it has seemed desirable to analyze them, in order that they, at least, may be put entirely out of view.

**II. CASES WHERE IT WAS HELD THAT THE DEFENDANTS WERE NOT SUABLE BECAUSE SUCH SUITS WERE, IN EFFECT, SUITS AGAINST THE STATE OR THE UNITED STATES.**

It must be remembered "That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by" the war-time acts of June 15, 1917, April 2, 1918, July 18, 1918, and November 4, 1918, were "transferred" by the Merchant Marine Act, 1920, § 4 (41 Stat. 990) to the Shipping Board; and in that way all title, if any, was taken away from the Fleet Corporation and vested in the United States; and thereafter the Fleet Corporation had neither title to nor possession of any of the property, except as it might have the possession thereof when

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the possession of the United States, and is not the kind of wrong that equity will enjoin.

If it be suggested (in order to come with class (c) *supra*) that recovery is sought of some specific property under the general language of the eighth prayer of the amended bill in the *Sloan Shipyards case* (R. 33), it need only be observed that at the time of the filing of the amended bill on March 21, 1921 (R. 58), the possession of all of the property had passed from the Fleet Corporation and had been taken over by the United States by the Merchant Marine Act, 1920, sec. 4 (41 Stat. 990); and hence the lawful right of possession being in the United States, the action is not maintainable (*Stanley v. Schwalby*, 162 U. S. 255, 278, 283; *Grisar v. McDowell*, 6 Wall. 363), and it was not the Fleet Corporation which was on March 21, 1921, withholding any property from the plaintiff.

If it be suggested that the seizure of the Sloan plant on December 1, 1917, was a past tort, we reply that damages for tort are not recoverable in equity (*Belknap v. Schild* 161 U. S. 10, 26, 27).

requested by the Shipping Board (41 Stat. 1007, § 35); and that it is the United States, and the United States alone, which now has, and had at the time of the filing of the amended bill, the title and possession to the property referred to in the *Sloan Shipyards* suit.

With that situation in mind, the *Astoria Co.* and *Sloan Shipyards* suits are against one of the executive agencies or instrumentalities chosen by Congress and the President to carry out war powers, and they seek, with respect to acts done in that capacity alone, (1) in both cases to recover money from such agency as damages for a breach of contract; and in the *Sloan case* (2) to cancel a mortgage owned and held by the United States; (3) to enjoin the sale, disposition, or removal of real and personal property in the possession of the United States under the lawful requisitioning thereof; (4) to take away from the United States, and to restore to the plaintiff, certain real and personal property now held by the United States under the Merchant Marine Act, 1920, and previously lawfully acquired by requisition; and (5) to settle the accounts between the plaintiff and the Federal instrumentality growing out of the requisitioning of the property and to recover the balance due on such an accounting.

The cases fall within one or more of the following classes of suits which have been held to be, in effect, suits against the State or the United States and, hence, not maintainable.

(1) *Interference with funds or property in the possession of the State.*—The Sloan Shipyards bill seeks to compel a restoration to it of the supplies, material, equipment, docks, plant, and real estate seized on December 1, 1917, and a money judgment for what an accounting shows is due it.

In *Lankford v. Platte Iron Works*, 235 U. S. 461, it was held that a suit by a depositor in a failed bank against the State banking board to secure payment of a deposit out of the depositor's guaranty fund was a suit against the State, and hence not maintainable. As the relation of the State in that case, both to the property and to the instrumentality, was far less immediate than the relation of the United States to the Fleet Corporation and to the property acquired under the war requisition acts, it will be useful to carefully analyze this recent case.

The Oklahoma Bank Guaranty law (*Noble State Bank v. Haskell*, 219 U. S. 104) provided that each bank should pay a small sum into a Guaranty Fund administered by the State Banking Board, who, in case of a failed bank, should pay the depositors at once, and if the Guaranty Fund were insufficient therefor, should issue 6 per cent warrants to the depositors and levy an assessment on all other banks to raise the money to pay off such warrants.

Although the fund was not raised by general taxation (nor placed in the State treasury, but kept on deposit in the contributing banks) nor in any way subject to the general purposes of the State, but was the property "of the contributing banks and is

accumulated in a fund for the security of their respective depositors," still, in view of the power which the State gave to its agency (banking board) to administer the fund by applying it to the payment of depositors of failed banks, this court held (largely on the authority of *Murray v. Wilson Distilling Co.*, 213 U. S. 151) that it was not a case of a *mandamus* to compel officials to perform a plain statutory duty, but that the State had such an interest in the fund that it was a *necessary party* to any suit dealing with the administration thereof and that, as it could not be sued, the bill must be dismissed. Surely it needs no argument to show that the interest of the United States in the property acquired by it through its \$3,300,000,000 war appropriations of public money and the requisitions thereunder, and the administration thereof through its delegated instrumentality (Fleet Corporation), is far greater and more vital than Oklahoma's interest in the bankers' compulsory cooperative guaranty fund—not created by public funds nor for a direct governmental purpose—which the State undertook to administer through one of its instrumentalities.

The court said:

"Where the State should vest title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the State should commit it to the mere ministerial administration of the bank commissioner and banking



board and subject them to controversies with depositors or draw around them the circle of its immunity was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?

\* \* \* it [the scheme of the statute] may be embarrassed if not defeated by subjecting the banking board to incessant judicial inquiries of its administration. We certainly can not assume that it will not do its duty and provide ultimate payment of all depositors. To this result the State makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against other persons, which may be enforced by the State for the benefit of the fund which it has created. \* \* \*

Here the property is that of the contributing banks and is accumulated in a fund for the security of their respective depositors. \* \* \* They [banking board] are not only empowered to liquidate the deposits or other indebtedness of failed banks, but to levy assessments on other banks to make up any deficiency. Therefore, as the State was said to be a necessary party in the cited case [*Murray v. Wilson Distilling Co.*] the State can be said to be a necessary party in the pending case because of its interest that the fund which it has caused to be created in pursuance of its policy shall be administered by the officers it has appointed rather than by judicial tribunals."

Can you assume that the United States will not do its duty towards its creditors? Should the United States be subjected to the embarrassment of "incessant judicial inquiries of its administration" of the war powers? Does not the United States have an interest in the property which it acquired, and determined to administer, through the Fleet Corporation?

The language of the four dissenting justices emphasizes the comparatively slight interest which Oklahoma had in the fund, and yet was deemed sufficient by the majority members to make it an indispensable party (p. 479):

"It seems to me clear that, by the language and evident meaning of this law, the State has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the State, or devoted to any of the ordinary purposes of the government, or to any purpose other than the payment of depositors. The State, it is true, through the banking commissioner, holds the bare legal title to the fund, and enforces in the name of the State the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus the State has title only, but without real ownership \* \* \*.

Not only has the State no part in the raising of the guaranty fund nor property in it, nor interest or responsibility in the distribution of it, nor even the remotest reversionary right should the scheme prove a failure, but the

Act contains no expression of a purpose that the public trustees are to be clothed with that immunity from private suit which is one of the prerogatives of sovereignty."

At the risk of repetition it must be urged that if where a State created a board to administer a fund, not contributed by the State but by banks pursuant to a statute, the officers administering the fund can not be sued in connection with the statutory requirements of its administration, because such a suit would be against the State, then *a fortiori*, a suit should not be maintainable against the Fleet Corporation to enforce, for example, specific performance of a contract to buy land for a shipyard; or for damages for a breach of contract, etc.

If the Fleet Corporation is, as opposing counsel contend, a mere private corporation, can it be that the courts, State courts, had the power under their local rules of corporate law, either (1) to put the Fleet Corporation into the hands of a receiver during the war, because, for example, it was creating vast liabilities and disposing of all its property—i. e., turning over the ships as fast as completed to the Shipping Board or Navy Department—or (2) now to obtain a decree for an accounting "determining and establishing the profits to which complainants are entitled under said contract, and upon such accounting for a decree of this court awarding to the complainants judgment against the defendant for such sum of money as the court shall determine the

plaintiffs are entitled to receive" (*Sloan Case* bill, R. 33)?

Assuredly not, and the answer is found in *Murray v. Wilson Distilling Co.*, 213 U. S. 151. Between 1892-1907 South Carolina had charge of the liquor business in the State and went into it as a private business,<sup>15</sup> putting certain State and County boards in control who, on behalf of the State, purchased and disposed of liquors under the dispensary system. In 1907 the former laws were repealed, a new system substituted, and a State commission created with power (1) to liquidate the existing business and stock of liquors, collect the debts due and pay the just liabilities of the old system, and (2) to investigate the legality of former purchases of liquor. Certain persons, having claims for the purchase price of liquors sold to the old board, filed suit in the Federal court against the new commission to enjoin the disposition of the fund that came into its hands until the claimants' debts were paid, upon the theory that it was a trust fund for the satisfaction of the debts of the old system, and receivers were appointed.

This court held that the suits really (p. 168)—

"sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State

<sup>15</sup> *South Carolina v. United States*, 199 U. S. 437, 454-5, 461, 463; *Scott v. Donald*, 165 U. S. 58; *Vance v. Vandercook No. 1*, 170 U. S. 438.

can not, against the objection of the State, be obtained in a court of the United States," citing *Hagood v. Southern*, 117 U. S. 52; *Christian v. Atlantic & N. C. R.*, 133 U. S. 233. " \* \* \* Considering the text of the winding-up act, we are of opinion that there is no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs of the State dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State."

While no receiver is asked in the present cases, they attempt to restrain the agency from removing or disposing of the property it acquired, to obtain an accounting, to require the payment of the amount found due, and to restore the properties, real and personal, tangible and intangible, to the plaintiff.

Was the relation of South Carolina to the liquor business within its limits and to its instrumentality for the liquidation of that enterprise more direct than that of the United States to the building of ships for war purposes, their disposition and the instrumentality (Fleet Corporation) selected to carry out the governmental policy?

In *Goldberg v. Daniels*, 231 U. S. 218, 221, this court denied a mandamus to compel the Secretary of the Navy to deliver a ship to the plaintiff, who was the highest bidder in response to an advertisement for proposals, because—

The United States is the owner in possession of the vessel. It cannot be interfered with behind its back, and, as it can not be made a party, this suit must fail. (*Belknap v. Schild*, 161 U. S. 10; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 606; *Oregon v. Hitchcock*, 202 U. S. 60, 69; *Naganab v. Hitchcock*, 202 U. S. 473, 476.)

The United States is the owner, under requisition, of the real and personal property (R. 25) which the Sloan Shipyards now demands shall be delivered up to it (R. 33).

In *International Postal Co. v. Bruce*, 194 U. S. 601, an injunction was refused against a postmaster which sought to prevent the use by his subordinates of a stamp-cancelling machine in a post office. This court said:

“In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession for a term which has not expired. It has a property, a right *in rem*, in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right cannot be interfered with behind its back and, as it cannot be made a party, this suit, like that of *Belknap v. Schild*, must fail.”

If a postmaster's use of a leased machine could not be enjoined, how can a court compel the actual restoration to the Sloan Shipyards of property held for the United States, even if it should be assumed, for argument's sake, that the actual physical possession is in the Fleet Corporation as delegate of the Shipping Board under the Merchant Marine Act, 1920, § 35?

In *Belknap v. Schild*, 161 U. S. 10, naval officers were in charge of the operation of a caisson, which the United States had built that infringed the plaintiff's patent. The officers had no personal interest in the gate. It was held that as the United States had both the title and possession of the gate, and could not use it except through agents, the bill would not lie against the agents either to enjoin its use, to destroy it, or to recover profits, although a suit at law for damages might lie against the defendants for their tort. Consequently the Sloan Shipyards bill for an accounting of profits arising from the use of its plant (R. 33) surely must be denied; all of the Fleet Corporation's profits, if any, from the operation of the seized plant were for, and went to, the United States alone.

If the Fleet Corporation, unlawfully and in excess of its authority under the war-power requisition acts, seized the plaintiff's yards, the latter might have an action at law for the tort against the officers who so acted—but that is the only remedy open, save to obtain the “just compensation” provided for in the requisition act itself.

In *Christian v. Atlantic & N. C. R.*, 133 U. S. 233, the State had issued its bonds and by statute declared that all its stock in a railroad company should be pledged as security for their repayment, and that the dividends therefrom should be applied to pay the interest on the bonds. A bondholder brought suit in equity against the railroad and the State officials holding the stock proxy, etc., to enjoin the payment of the dividends to the State, to secure a lien on the stock, and to have any dividends applied to the past-due interest.

It was held that the bill must be dismissed as the State was a necessary party to a suit to apply dividends (that might become due) to the payment of the bonds, or to transfer stock held and owned by the State, the court saying (p. 244-6):

"It remains true, therefore, that a bill will not lie to effect a foreclosure and sale, or *to obtain possession of property belonging to the State*; and for the very plain reason that, in such a case, the State is a necessary party and can not be sued. \* \* \* The State of North Carolina is the only party really concerned. The whole proceeding is virtually against her. The object of the suit is to get possession of her property; to sequester her dividends (if any there may be) and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in sole possession. Be it true that the bondholders have a lien on said dividends and stock, it is not a lien that can be enforced without suit;



and that a suit against the State. \* \* \* No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina has of the stock in question. There may be contract claims against it; but they are claims against the State; because based solely on the contract of the State, and not on possession.

We think that the State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligation; and that the present suit is of that character and cannot be sustained."

Is not the United States an equally necessary party to so much of the Sloan Shipyards bill as seeks (1) to cancel the mortgage (which was given to secure a \$1,000,000 bond executed to the Fleet Corporation "representing the United States of America" R. 44, 50, 51) held by the United States<sup>16</sup> and (2) to take the other properties from the United States<sup>17</sup> and restore them to the plaintiff.

In *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, Georgia, by statute, created two successive mortgage liens on a railroad; and later the first mortgage was foreclosed by the governor, the State issued its own bonds in lieu of the defaulted bonds, and the State bought the railroad and took possession. Later, the second-mortgage bondholders filed suit against the railroad, its directors, and the governor

<sup>16</sup> While the mortgage was executed to the Fleet Corporation as mortgagee, it belonged to the United States which by the Merchant Marine Act, 1920, assumed the title and possession thereof and transferred it to the Shipping Board.

<sup>17</sup> The other properties were similarly transferred.

and State treasurer attacking the foreclosure, seeking to participate *pro rata* in whatever the first-mortgage bondholders received, and praying a foreclosure of the second mortgage, sale of the road, etc.

The bill was dismissed, the court saying (p. 457):

“In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under the foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession.

On the hypothesis that the foreclosure by the governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer, as settled in *Louisiana v. Jumel*.

If any branch of the State government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members

by mandamus, to compel them to prove means to pay the State's indorsement?

The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process."

So here the United States alone is interested, has possession of the bond, mortgage, and property, and no court can deliver possession to the plaintiff of what has been transferred to the Shipping Board under the Merchant Marine Act, 1920.

In *Louisiana v. Jumel*, 107 U. S. 711, the State issued consolidated bonds and levied a tax to pay them, but later repudiated the contract and by its constitution forbade its officers to carry it out. Bondholders sought by mandamus to compel the State officials to carry out the plain provisions of the prior conceded contract, which it had no power to impair. It was held that the State could not be thus compelled to carry out its contract, and that its officers could not be made to carry out a valid statute which they had been forbidden to execute by a later, even void, statute, because it was really a suit against the State. Does not that dispose of the Sloan Shipyards' attempt to compel a restoration to it by the Fleet Corporation of properties which the Merchant Marine Act, 1920, transferred to the Shipping Board and, in effect, prohibited the Fleet Corporation from transferring to others?<sup>18</sup>

<sup>18</sup> How far, if at all, *Louisiana v. Jumel* may have been modified by later cases holding that an unconstitutional statute could afford no protection to officers acting under it, see Singewald's "The Nonsuability of the State," pp. 69-80.

Finally, in *Case v. Terrell*, 11 Wall. 199, the creditors of a failed national bank brought suit against its receiver and the Comptroller of the Currency praying that a debt due by the bank to the United States be ascertained, that the United States account for certain sums, and that the Comptroller be enjoined from making a dividend of the bank's fund until the accounting was adjusted. A decree for \$206,039.91 against the United States and in favor of the creditors was entered, the comptroller was ordered to distribute the funds, and the United States was denied priority therein except as to bonds pledged to secure circulation.

This court reversed the decree and dismissed the bill in a sharp opinion holding that the question of the Government's priority or liability could not be decided in a suit against the comptroller even if he consented thereto. The court said (p. 203):

"The United States can not be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy.

But it is useless to pursue the matter further. The only substantial relief asked by the bill, or granted by the decree, is against the United States. The manifest purpose of the proceeding was to subject the Government to a tribunal which could rightfully exercise no jurisdiction in the premises. It was no party to the suit, nor did any party represent its interests who had authority to bind."

Similarly here it can not be that the Fleet Corporation, even if it had consented (which it did not), could enable a decree to be entered settling the accounts between the Sloan Shipyards and itself "representing the United States," decreeing the amounts due, and restoring property to the plaintiff now held by the United States, and enjoining it, as the representative of the United States, from asserting any right or title to the deposit and bonds in the Seattle banks.

(2) *Attempts to compel or restrain action regarding title to lands.*—In *Knight v. Lane*, 228 U. S. 6, *Ness v. Fisher*, 223 U. S. 683, and *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, applications for mandamus were denied where, the title to public land being still in the Government, attempts were made to control the action of departmental officers regarding the issuance of patents. The principle underlying these cases is thus expressed in *Ness v. Fisher*, p. 691:

"So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative."

While the cases at bar are not mandamus cases, yet in the *Sloan Case* an attempt is made to enjoin a governmental agency from removing books and records from an office and to compel such agency to permit the plaintiff to have access thereto, and to furnish an accounting. As such books and records are in the possession of the United States, the attempt to control the agency's discretion with respect thereto comes very close to falling within the cases just cited.

*Minnesota v. Hitchcock*, 185 U. S. 373, *Oregon v. Hitchcock*, 202 U. S. 60, and *Louisiana v. Garfield*, 211 U. S. 70, were original actions in this Court brought by those States against the Secretary of Interior seeking to enjoin him from selling, patenting, or making any disposition of certain lands to which those States claimed title. It was held that the United States was the *real party in interest*; that it consented by statute to be sued in the *Minnesota* case, and the bill was there dismissed on its merits; that in the *Oregon* and *Louisiana* cases no consent to be sued had been given and that as the legal title to the public lands was still in the Government, no suit could be brought without its consent which would permit an inquiry into the question of title. In the *Louisiana* case there were questions of law and fact as to whether the United States still owned the land. The Court pointed out the contentions which the United States might make in that respect and said (p. 77):

“It raises questions of law and of fact upon which the United States would have to be

heard. The United States fairly might argue that, \* \* \* for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact cannot be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit."

So here, if the United States were a party it might contend that under the requisitioning acts it had seized and taken title to all of the property described in the *Sloan Shipyards Case* and that the only remedy of the latter was to apply for just compensation under the terms of such act. If the title to the Sloan Shipyards property is in the United States, obviously no court could grant the prayer in the *Sloan Case* that the property be returned to it and that the Fleet Corporation be enjoined from disposing of the property as the United States might direct. Consequently, the rights of the United States to the property in question cannot be tried behind its back, it is a necessary party, and the bill must be dismissed.

In *Stanley v. Schwalby*, 147 U. S. 508 (and on a second writ of error 162 U. S. 255), it was held that where the United States had title to part of a tract of land, no judgment could be entered against United States officers awarding title to the plaintiff for another interest in the land and possession of the whole

jointly with the individual officers, because such judgment (162 U. S. p. 272)

“was directly against the United States and against their property and not merely against the officers.”

Similarly here, a decree cancelling the mortgage, permitting complainants to have access to the books and records, and restoring the properties to the plaintiff would operate directly against the United States and its property.

It is needless to multiply authorities. It is abundantly settled that suits cannot be brought against officers of the Federal Government, the object of which is (a) to compel the execution of a contract (*International Construction Co. v. Lamont*, 155 U. S. 303), (b) to compel acts to be done, which, when done, would constitute performance by the State of a contract, or to enjoin things from being done which if done would constitute a breach by the State of a contract (*In re Ayers*, 123 U. S. 443; *Hagood v. Southern*, 117 U. S. 52), (c) to compel some affirmative official action in the performance of an obligation of the State (*Hagood v. Southern*, 117 U. S. 52, 69, 70) or (d) to collect money (*Smith v. Reeves*, 178 U. S. 436, 439; *Louisiana v. Jumel*, 107 U. S. 711, 726-8; *Belknap v. Schild*, 161 U. S. 10, 26) where, under the principles enunciated in the cases at p. 54 supra, the State being a necessary party, on account of the effect of the decree on its property or rights, the bill must be dismissed (*Wells v. Roper*, 246 U. S. 335, 337; *Christian v. Atlantic & N. C. R.*, 133 U. S. 232, 241, 244, 245;



*Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 451, 457).

(3) *Injunctions to restrain Executive officers or agents from the performance of their duty.*—In *Wells v. Roper*, 246 U. S. 335, the plaintiff sued the First Assistant Postmaster General to enjoin him from canceling or otherwise interfering with the performance of a contract which the plaintiff had with the Postmaster General for furnishing certain automobiles for use in collecting the mail. The court held the bill must be dismissed on its face because the defendant was without personal interest, was acting solely in his official capacity and within the scope of his duties, and that the effect of the injunction would be to interfere with one of the ordinary processes of Government; that the interests of the Government were so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party defendant; that the plaintiff's duties with respect to the contract were not ministerial, but were executive, and required the exercise of official discretion; and that the bill could not be maintained even though "the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States." This is quite in point on the *Astoria Co.'s* suit for a breach of contract.

In *Louisiana v. McAdoo*, 234 U. S. 627, the State of Louisiana sought to file a bill against the Secretary of the Treasury to prohibit him from allowing certain reduced duties on sugar importations. It was held

that the duties of the Secretary of the Treasury involved the exercise of judgment and discretion in carrying out the revenue collections of the Government and that to interfere in the exercise of such duty would be to interfere with the ordinary functions of Government and be in effect a suit against the United States. To the same effect see *United States v. Black*, 126 U. S. 40, 48; *Decatur v. Paulding*, 14 Pet. 497, 515.

The Fleet Corporation is an executive agency of the Government, and while the Sloan Shipyards bill may not endeavor to control its discretion, these cases illustrate the general tendency not to interfere with agents of the Government in their management of Government work.

In the light of the foregoing authorities (p. 62-81 *supra*), the present suits against the Fleet Corporation (to recover damages from it, to cancel a mortgage, which, while standing in its name, has been transferred to the United States by operation of law, to restore properties to the plaintiff, which are now in possession of the United States, and generally to supervise and control the operations of the Fleet Corporation), are in substance and effect suits against the United States, because they relate only to acts performed by the Fleet Corporation, not under any general corporate power as derived from its incorporation, but as the specially selected agency to carry out the war powers of the President.\*

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\* To same effect see *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 152; *Dakota Central Tel. Co. v. South Dakota*, Id. 163; *Macleod v. N. E. Tel. Co.*, Id. 195, 199; *Kansas v. Burleson*, Id. 188, 190.

CONGRESS HAS PROVIDED A REMEDY WHICH IS EX-  
CLUSIVE.

5. By the act of June 15, 1917, it was provided as follows (40 Stat. 183):

"Whenever the United States shall *cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.*

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: \* \* \*

That statute provided a specific remedy for any damage which the Sloan Shipyards might sustain by the act of the United States in cancelling the former's advantageous contracts with third parties or taking over its plant and operating it. The President determined the just compensation, and if not satisfac-

tory to the Sloan Shipyards, it could take 75% of such amount in cash and sue the United States for the balance in the Court of Claims, or, if not exceeding \$10,000, in the District Courts.

As the wrongs of which the Sloan Shipyards complains were all committed by the Fleet Corporation while acting under the Act of June 15, 1917, is it not perfectly plain that the Sloan Shipyards' remedy, and exclusive remedy, is to follow the provisions of the statute, just as Congress provided with respect to a great number of other war time requisitions (See *United States v. Pfitsch*, 256 U. S. —, decided June 1, 1921)?

Under the numerous other statutes cited in the *Pfitsch Case*, the actual requisitioning was done by various Federal instrumentalities. Can it be that aggrieved persons are free to sue those individual agencies which requisitioned the property (as is attempted to be done here)? Are they not limited to the "just compensation" as fixed by the President, and if dissatisfied therewith, required to sue for the balance in the particular manner provided by the statute authorizing the United States to be sued?

When Congress undertook to authorize requisitioning, cancellation, etc., and to afford, as under the Fifth Amendment it was bound to afford,\* a provision for just compensation, its legislation on that point

\**Crozier v. Krupp* 224 U. S. 290, 306; *Sweet v. Rechel* 159 U. S. 380, 399, 402; *Backus v. Fort Street Union Depot Co.* 169 U. S. 557, 568-9; *Cherokee Nation v. Kansas Ry. Co.* 135 U. S. 641, 658.

was necessarily exclusive and the claimants have no right to pursue some other method for collecting compensation for their alleged injuries (*Arnson v. Murphy* 109 U. S. 238, 243, *United States v. Babcock* 250 U. S. 328, 331); and until the plaintiff shall have had an award by the President, it has no right to maintain any suit, even if it be conceded for the sake of argument that the Fleet Corporation is ordinarily suable as any other corporation. In this particular instance, Congress has limited the right of the aggrieved person to the "just compensation" method. It seems as if Congress provided, as plainly as the English language could express it, that when the Fleet Corporation acted as agent of the President, suit was to be brought against the United States and *not* against the Fleet Corporation. There is no more reason to bring suit against the Fleet Corporation when it was acting as the authorized delegate of the President in the requisitioning of plants, ships, contracts, and materials, than there would be to bring suit against the President or the Secretary of the Navy when he was acting as such delegate of Congress' powers.

In *United States v. Babcock* 250 U. S. 328 army officers sued and recovered judgments in the Court of Claims under the Act of 1885 which authorized reimbursement of claims of that character for the loss, while in the service and without fault, of privately owned personal property. It was held that no recovery could be had, because the Act contemplated that the determination of liability should be

by the Treasury Department and not by the Court of Claims. The Court said (p. 331):

"These general rules are well settled. (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the Courts [citations omitted]. (2) That when a statute creates a right and provides a special remedy, that remedy is exclusive. *Wilder Mfg. Co. v. Corn Products Co.* 236 U. S. 165, 174-175; *Arnson v. Murphy* 109 U. S. 238; *Barnett v. National Bank* 98 U. S. 555-558; *Farmers Natl. Bank v. Dearing* 91 U. S. 29, 35." See also *Paine Lumber Co. v. Neal*, 244 U. S. 459-471."

In *Geddes v. Anaconda Mining Co.* 254 U. S. 590, 593, it is said:

"It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to the Act, a suit such as we have here, would not now be entertained."

It should now be decided that no person, claiming compensation or damages for any act of the Fleet Corporation as delegate of the President's war powers, can maintain any action therefor save (a) for the amount claimed above 75% of the President's award and (b) only in the Courts specified in the Act, namely the Court of Claims and the District Courts exercising the jurisdiction of the Court of Claims within the limit of \$10,000.

## THIRD POINT.

An analysis of, and reply to, the arguments advanced by the District Courts which have held that the Fleet Corporation is suable as a private corporation.

All of the arguments for holding the Fleet Corporation suable as any private Corporation would be, are reducible to the following propositions:

1. That the United States' ownership of the entire capital stock did not thereby confer on the Fleet Corporation the sovereign's immunity from suit.<sup>19</sup>

2. That it is unbelievable that Congress could have intended to create a corporation that would buy supplies and incur obligations to private persons and yet be immune from all ordinary judicial processes.<sup>20</sup>

3. That in order to carry out an ordinary industrial and commercial purpose, to wit, construction of ships, Congress authorized the creation of the Fleet Corporation under the laws of the District of Columbia, which provided that the corporation could "sue and be sued," and that hence it is suable by the very terms of its creation.<sup>21</sup>

4. That the United States consented to be sued.<sup>22</sup>

<sup>19</sup> *Pope v. Fleet Corp.* 269 Fed. 319; *Ingersoll Rand Co. v. Fleet Corp.* 187 N. Y. Sup. 695, 698; *Lord & Burnham Co. v. Fleet Corp.* 265 Fed. 955, 956; *Am. Cotton Oil Co. v. Fleet Corp.* 270 Fed. 296-7.

<sup>20</sup> *Com. Finance Co. v. Landis* 261 Fed. 440, 443-4; *Gould Coupler Co. v. Fleet Corp.* Id. 716, 718; *Lord & Burnham Co. v. Fleet Corp.* 265 Fed. 956; 959; *Haines v. Lone Star etc. Co.* 268 Pa. 92, 102.

<sup>21</sup> *Haines v. Lone Star etc. Co.* 268 Pa. 92, 98; *Eichberg v. Fleet Corp.* 273 Fed. 886, 892-3; *In re Eastern Shore Co.* 274 Fed. 893, 899, 902; *Lord & Burnham Co. v. Fleet Corp.* 265 Fed. 956, 957, 959; *Am. Cotton Oil Co. v. Fleet Corp.* 270 Fed. 296-7; *Banque-Russo v. Fleet Corp.* 266 Fed. 897, 899.

<sup>22</sup> *Com. Finance Co. v. Landis* 261 Fed. 440, 444; *Southern Bridge Co. v. Fleet Corp.* 266 Fed. 747, 752.

5. That Congress's creation of a corporation for the purpose of executing some governmental power did not confer any immunity from suit upon such corporation.

6. That *The Lake Monroe* 250 U. S. 246 conclusively held that when the President selected the Fleet Corporation as a Federal instrumentality to execute his war powers, he took it *cum onere*, with all its existing limitations, including its liability to suit as any ordinary private corporation.<sup>23</sup>

Of these in their order:

(1) *That the United States ownership of the entire capital stock did not thereby confer on the Fleet Corporation the sovereign's immunity from suit.*—Despite strong views to the contrary,<sup>24</sup> this may be conceded, for the Fleet Corporation's claim of immunity is in no wise based on the Government's ownership of its entire capital stock, but it is based upon its own character as exclusively a Federal instrumentality under the Act of June 15, 1917, Executive Order of July 11, 1917, and subsequent statutes and orders. Its claim of immunity would be exactly the same if

<sup>23</sup> *Gould Coupler Co. v. Fleet Corp.* 261 Fed. 716; *Lord & Burnham v. Fleet Corp.* 265 Fed. 955, 958; *Perna v. Fleet Corp.* 266 Fed. 896; *American Cotton Oil Co. v. Fleet Corp.* 270 Fed. 296.

<sup>24</sup> See the dissent of Mr. Justice Story in *Briscoe v. Bk. of Ky.* 11 Pet. 257, 329, 343-4, whose views were shared by Chief Justice Marshall; and the strong criticism of that case by Mr. Justice Miller in his *Lectures upon the Constitution*, p. 583, and by Willoughby on the *Constitution*, Sec. 42, p. 83. The doctrine of the *Planters Bank*, *Briscoe* and similar cases should not be extended beyond the precise points involved; and really should have no application to instances where the United States organized a corporation, owning all the stock, as an appropriate means to execute some express power.



its stock were all owned by private persons; and hence this point may be ignored as irrelevant. But in this connection, the significant language of *Bank of Kentucky v. Wister*, 2 Pet. 318, 324, quoted in the *Briscoe* case, foreshadows our own contention:

“If a State did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks, from a direct issue of bills of credit.”

And one of the grounds of the decision in the *Briscoe* case was that

“in becoming an exclusive stockholder in this bank, the State imparts to it none of its attributes of sovereignty.”

While the complete *ownership* of the stock, without more, imparts none of the attributes of sovereignty, yet the United States, subsequently and independently, *did impart to the Fleet Corporation its attributes of sovereignty* by constitutionally making it the instrumentality by which the Governmental powers should be directly exercised upon the property rights of citizens. It is in that aspect, foreshadowed in the *Wister* case, that the Fleet Corporation is immune from suit.

The entire point of the *Planters Bank*, *Wister*, *Strang* and similar cases is that agents of a corporation are not generally agents of the stockholders and cannot contract for them by virtue of the mere relation of the stockholder to the corporation (*U. S. v. Strang* 254 U. S. 491-3), but that is a very different

thing from a stockholder, affirmatively constituting the corporation his agent or instrumentality for carrying out his own purposes.

(2) *That it is unbelievable that Congress could have intended to create a corporation that would buy supplies and incur obligations to individuals and yet be immune from all ordinary judicial processes.*—Whatever force there might be in this suggestion when considering the Fleet Corporation's general liability to suit for acts done under the authority of the Shipping Act, 1916 (concerning which these cases require no expression of opinion), and conceding, for argument's sake, that the Fleet Corporation is suable for any of its transactions under that Act,\* the suggestion is irrelevant in determining the Fleet Corporation's liability to suit for acts done as the agent of the President under the Act of June 15, 1917. And this is so because (1) Congress expressly prescribed a method by which the United States could be sued and "just compensation" obtained on account of any of the Fleet Corporation's purchases, requisitions or acts (p. 82 *supra*), and (2) it has always been the Congressional policy that all Governmental agencies (War, Navy, Postoffice, and other Departments) in the purchase of supplies and in other contractual relations should be absolutely immune from ordinary judicial processes (Judicial Code, § 24, subsec. 20; § 145); and hence there is nothing "unbelievable" in Congress intending that the same, or a substantially similar, procedure should apply to

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\*This was the view in the carefully reasoned opinion in *Ingram Day Lumber Co. v. Fleet Corp.* 267 Fed. 283, which comes very close to the true solution of this entire subject.

this new war time agency. Indeed, the only novel feature was that the President, having authority to select *any* agency he chose, adopted a corporation instead of an individual—but the liability to suit is exactly the same in each instance. If the President had selected the Secretary of the Navy instead of the Fleet Corporation, he would certainly have been immune from similar suits in the State and Federal Courts generally. Regardless of what its charter powers were under the laws of the District of Columbia, those laws must be deemed to have been *pro tanto* changed or amended when Congress, through the President, imposed on the Fleet Corporation certain duties. It thereby acquired all the necessary powers regardless of any pre-existing charter limitations.\*

(3) *That in order to carry out an ordinary industrial and commercial purpose, to-wit, construction of ships, Congress authorized the creation of the Fleet Corporation under the laws of the District of Columbia, which provided that the corporation could "sue and be sued" and that hence it is suable by the very terms of its creation.*—The general provision of the District of Columbia Code § 607 that a corporation organized thereunder should

*"be capable of suing and being sued in any court of law or equity in the District."*

only intended to render this corporation capable of suing and being sued by its corporate name in any court in the District of Columbia (See *Natl. Volunteer Home v. Parrish* 229 U. S. 494, 497), where the court

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\* For an apt illustration, see p. 25, note *supra*.

had jurisdiction otherwise over the corporation (*Bankers Trust Co. v. Tex. & Pac. Ry.* 241 U. S. 295, 303-5; *Porto Rico v. Rosaly* 227 U. S. 270, 277). In the *Rosaly Case* it was said (p. 277)

“In a sense the words “to sue and be sued,” applied, as they normally have been, in grants of private or public charters, are *redundant*, since they but express the existence of powers which would naturally be implied.”

But the general capacity to be sued thus granted by the laws of the United States (for the District of Columbia Code was an Act of Congress 31 Stat. 1189) was not intended to render the corporation liable to suit on account of acts for which by settled law it was immune. That may have been the reason Congress required the Fleet Corporation to be organized under the laws of the United States rather than under the laws of some State.

(4) *That the United States consented to be sued.*—In the *Southern Bridge Co.* and *Landis cases* (266 Fed. 747, 752 and 261 Fed. 440, 444) it was held that suits against the Fleet Corporation were suits against the United States, but that they were maintainable because the United States had *consented* to be sued in the District Courts for less than \$10,000 (Judicial Code § 24, sub. sec. 20) or in the Court of Claims (Id. § 145); but the learned Judges delivering those opinions apparently overlooked the point that the United States had given a special consent to be sued only for any balance that might be claimed in excess of 75% of the President's award of “just compensa-

tion," and that such consent was exclusive (p. 82 *supra*) and rendered inapplicable the general provisions of the Judicial Code just cited.

Even conceding, for the sake of argument, that the provision for "just compensation" is not exclusive and that actions may be maintained under Judicial Code §§ 24, 145, there is certainly no jurisdiction to sue the Fleet Corporation in the State Courts<sup>25</sup> (*Smith v. Reeves* 178 U. S. 436-445).

The *Astoria Case* was brought in a State Court and the *Sloan Shipyards Case* involves more than \$10,000. Therefore, those two suits were properly dismissed, and the judgments should be affirmed.

(5) *That Congress' creation of a corporation for the purpose of executing some Governmental power did not thereby confer upon such corporation an immunity from suit.*—It is not necessary to decide that every corporation chartered by Congress is immune from suit unless its charter expressly provides that it

<sup>25</sup> Numberless suits have been brought against the Fleet Corporation in the State Courts, as for example the *Landis* (261 Fed. 440), *Lord & Burnham* (265 Fed. 955), *Southern Bridge* (266 Fed. 747), *Ingram Day* (267 Fed. 283), *Lone Star* (268 Pa. 92), *Ingersoll Rand* (187 N. Y. Sup. 695) and the *Astoria Co.* case at bar.

While Congress has frequently given its consent for the United States to be sued, it is believed that it has invariably limited such consent to suits in the Federal Courts. (See Acts of May 26, 1824 Re Missouri Land Titles; May 23, 1828 and May 26, 1830 Re Florida Lands, *U. S. v. Clark*, 8 Pet. 436, 445, 465; Feby. 24, 1855, 10 Stat. 612; March 3, 1863, 12 Stat. 765; March 3, 1887 24 Stat. 505, *Schillinger v. U. S.* 155 U. S. 163; Joint Resolution July 2, 1864, *Cross v. U. S.* 14 Wall. 489; Acts of March 22, 1884, *Carroll v. D. C.* 22 Ct. of Claims 104; Feby. 26, 1885, 23 Stat. 639, *U. S. v. Cumming*, 130 U. S. 452; July 8, 1886, *Irwin & Co. v. U. S.*, 23 Ct. of Claims 149; March 3, 1887 *U. S. v. Barber* 74 Fed. 483; *Bowe v. U. S.* 42 Fed. 761; March 2, 1889 *Walton v. U. S.* 24 Ct. of Claims 372; July 28, 1892 27 Stat. 320, *Oakes v. U. S.* 174 U. S. 778; May 27, 1902 32 Stat. 242, *Watts v. U. S.* 126 Fed. 105.)

may be sued, nor, if it is liable to suit generally, when and under what conditions, it may be immune on account of actions taken as a Governmental instrumentality. Just as, under some circumstances, the States may tax property used by agents of the United States in executing Governmental powers (*Gromer v. Standard Dredging Co.* 224 U. S. 362; *Baltimore Shipbuilding Co. v. Baltimore* 195 U. S. 375, 382) and also the property of corporations chartered by Congress and engaged in performing Federal services (*Thompson v. R. R.* 9 Wall. 79; *R. R. Co. v. Peniston* 18 Wall. 5, 30-35), while, on the other hand, the States cannot tax the property of other Governmental instrumentalities (*Choctaw & Gulf R. Co. v. Harrison* 235 U. S. 292; *Farmers Bank v. Minnesota* 232 U. S. 516; *Owensboro Natl. Bank v. Owensboro* 173 U. S. 664), so it is that many corporations chartered by Congress are ordinarily subject to suit, as the acts of incorporation usually provide that they may sue and be sued, while, on the other hand, such corporations may be *immune* from suit if the nature of the transaction is such that by established rules of law such a suit cannot be maintained.

When power is conferred upon a corporation to sue and be sued, it derives only the same power which each individual inherently possesses. Therefore, in many instances heretofore cited where individuals were immune from suit because the suit was really against the State or the United States (p. 62-81 *supra*), such immunity would also have attached to

any corporation, if it had been occupying the identical position of agency which the individual occupied. In other words, when, under the war power, Congress gave to the President the authority to delegate his power to any agency he might select, it was entirely immaterial whether he selected an individual or a corporation. In either event the same incidents attached.

It cannot be that the paramount authority to select appropriate means for executing the powers of Congress is so limited that an individual when selected is immune from suit, while a corporation when selected is liable to suit.

(6) *That The Lake Monroe 250 U. S. 246 conclusively held that when the President selected the Fleet Corporation as a Federal instrumentality to execute his war powers, he took it cum onere with all its existing limitations, including its liability to suit as any ordinary private corporation. This misconceives The Lake Monroe decision, which arose out of the following facts.*

In 1917, all American ships, built or building were respectively requisitioned by the Shipping Board and the Fleet Corporation, so that all American shipping was in their control.<sup>26</sup> With that full knowledge, Congress on July 15, 1918, amended and re-enacted § 9 of the Shipping Act, 1916, as follows (40 Stat. 900):

"That any vessel purchased, chartered or leased from the [Shipping] board may be regis-

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<sup>26</sup> See U. S. Shipping Board's Annual Reports 1917 p. 8, 11, 14; 1918 p. 33-35, 45-54, 65, 69; 1919 p. 14, 15.

tered \* \* \* as a vessel of the United States \* \* \*.

Every vessel purchased, *chartered* or leased *from the board*, shall, unless otherwise authorized by the Board, be operated only under such registry or enrollment and license.

Such vessels *while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels*, whether the *United States* be interested therein as *owner*, in whole or in part, or hold any mortgage, lien, or *other interest* therein."

The Fleet Corporation, having requisitioned the *Lake Monroe*, completed and delivered her to the Shipping Board, which, by the Executive order of July 11, 1917, had been directed to take over the operation and disposition of all vessels "heretofore or hereafter acquired by the United States."

Up to this point everything had been done exclusively under the war power act of June 15, 1917.

Now the powers of the Shipping Board under § 9, for the first time, came into play.

The Shipping Board then returned the vessel to the Fleet Corporation as its agent; and it, in turn, as such agent of the Shipping Board, and on its behalf, assigned the vessel to Randall & Co., which, in turn, after manning and equipping her for the account of the Shipping Board, chartered her to the New England Transportation Co., a private Boston concern, which operated her, carrying a cargo of coal for private use. In October, 1918, a collision took place and the question presented was whether the vessel



was immune from seizure as Government property, or whether it came within the above quoted provisions of § 9 of the Shipping Act, 1916, as amended July 15, 1918.

The Government contended that the *Lake Monroe* was owned and operated by the United States and hence immune from judicial process; that the relation of the Shipping Board and of the Fleet Corporation thereto was exclusively under the Presidential Order of July 11, 1917; and that the vessel never became subject to the limitations of the Shipping Act, 1916, § 9.

This Court held that the *Lake Monroe* was employed solely as a merchant vessel; that she had been chartered from the Shipping Board; and that when Congress, on July 15, 1918 provided that such a vessel should be subject to seizure, even though the United States were *interested therein as owner, or otherwise*, Congress must have intended it to apply to a case where a vessel had been requisitioned, acquired by the Shipping Board and chartered from her as a merchant vessel.

Indeed, as the Shipping Board had requisitioned *all* American vessels, and as every American vessel was then either operated by the Government or under lease or charter from the Shipping Board, *there would have been nothing on which the Act of July 15, 1918 could have operated, unless it had been intended to operate upon requisitioned vessels chartered by the Shipping Board to third parties for use as merchant vessels.* In order to give any effect whatever to the

Act of July 15, 1918, it had to be held applicable to the *Lake Monroe*.

Vessels operated by the Shipping Board or by the Fleet Corporation as its agent were concededly immune from seizure. This was itself a recognition of the governmental character of the Fleet Corporation.

The effect then of *The Lake Monroe* decision was simply to hold that under the act of 1918 if, and when, the Shipping Board chartered a vessel to private parties for merchant use, such vessels, notwithstanding the United States' ownership or interest therein, became subject to the ordinary rules of admiralty law. The United States by this act simply waived the immunity which it otherwise had, which was a recognition that otherwise the Fleet Corporation, its property and operations were exempt—an admission that the Fleet Corporation occupied such a relation to the Federal Government as an instrumentality thereof, that property in its possession or control was not its own private corporate property, but was that of the United States.

In order to do away with *The Lake Monroe* decision, Congress promptly adopted the Suits in Admiralty Act of March 9, 1920 (41 Stat. 525), prohibiting the seizure of any vessel owned, possessed or operated by or for the United States or the Fleet Corporation, so long as the United States owned all its stock.

If the decision in *The Lake Monroe* be given the effect attributed to it by the District Courts, the result will be,

(1) To subject the United States to liability in tort, whereas, heretofore it has only consented to be sued on claims founded on the Constitution and laws of the United States, or based upon contracts.

(2) To subject the United States to affirmative relief in equity, to the specific performance of contracts, etc., which proceedings could not heretofore be maintained.

(3) To subject the United States to suits (a) for unlimited amounts in the State Courts of 48 different States, and (b) for amounts in excess of \$10,000 in the Federal Courts, to neither of which has it ever heretofore consented; and this would necessitate the maintenance of a large corps of counsel throughout the country, whereas, similar litigation involving the operations of other Governmental Departments is centered in Washington. The Fleet Corporation's records are concentrated here and it would greatly hamper the Government to prepare cases all over the country when records are here which might be needed in several parts of the country at once.

(4) To give to persons having business relations with the Fleet Corporation a discriminatory advantage over all other persons having similar business relations with other Governmental departments.

It was certainly never the *intention* of Congress to consent that the Government should be sued with

respect to war time activities in State and Federal Courts throughout the whole country.

*United States v. Strang*, 254 U. S. 491, strongly relied on by appellants, is not in point. Strang was a member of a firm. He was also an employee of the Fleet Corporation, and as such he gave an order to his firm for making certain repairs on a ship. Criminal Code, § 41, prohibits any member of a firm from acting

“as an officer or agent of the United States for the transaction of business with such  
\* \* \* firm.”

In construing this criminal statute, it was held that an employee of the Fleet Corporation was not such an “officer or agent of the United States for the transaction of business” as made it criminal for him to give a Fleet Corporation order to his firm; that under the war time delegation of authority, the Fleet Corporation was a separate entity (as undoubtedly it was); and that its employees were not appointed by the President nor by any officer designated by Congress, but were only subject to removal by the Corporation and could contract only for it, and certainly,

“In such circumstances we think they [defendants] were not *agents of the United States* within the intendment of Section 41.”

The decision was based on the proposition that the agents of a corporation are not agents for the stockholders and can not contract for the stockholders. The decision was plainly right, as it would

be a very harsh thing to hold a man who was employed by the Fleet Corporation, and who knew no other employer, to be an officer or agent of the United States. Such an employee might well think he was only employed by the Fleet Corporation and could not perceive how he was in any wise an officer or agent of the United States.

This view is reflected in *Krichman v. U. S.* 256 U. S. —, decided May 16, 1921, where it was held that a baggage porter of the Pennsylvania Railroad, while under Government control, was not a person acting for the United States "in any official function."

There is nothing in the *Strang* case to militate against the contention that the Fleet Corporation was an instrumentality of the United States executing purely Governmental duties. But when, and while, executing such duties for the Government, its own employees did not thereby become officers or agents of the United States. The Fleet Corporation could be an instrumentality of the United States, although its employees might not be either officers or agents of the United States within the meaning of the criminal statutes.

#### FOURTH POINT.

The Fleet Corporation is entitled to a priority of payment in the Eastern Shore Case, as its claim is a "debt due to the United States."

Under a contract of August 22, 1918, which the Fleet Corporation entered into "representing the United States of America," (R. 54) it was allowed a claim in bankruptcy of \$328,017.72 against the other

party to that contract, to-wit, the Eastern Shore Co. (R. 84).

As the contract was made on behalf of the United States for the construction of certain vessels under the war power act of June 15, 1917, and the President's July 11, 1917, Order, thereunder (R. 1, 3), the question whether this is a claim of the Fleet Corporation as a private corporation, or is a claim of the United States, depends upon a decision of the questions argued in the *Sloan* and *Astoria Cases*.

If it shall be decided that the Fleet Corporation is an instrumentality of the Government, and that its claim is a claim of the Government, then a further question is presented as to its priority in bankruptcy under R. S. 3466 and Bankruptcy Act § 64.

1. An Act of March 3, 1797 (1 Stat. 515), now R. S. 3466, provided that in case of the insolvency of any person "indebted to the United States" the "debt due to the United States" should be paid first.

The Bankruptcy Act of March 2, 1867 (14 Stat. 531) provided that the following claims should be paid in full in the following order, (1) administration expenses; (2) "all *debts* due to the United States *and* all taxes and assessments under the laws thereof"; (3) debts and taxes due to the State where the bankruptcy is pending; (4) wages for labor within six months; (5) debts to persons who by the laws of the United States are given a preference.

In *Lewis v. United States*, 92 U. S. 618, it was held that the debts due to the United States, which by the Act of 1797 were given priority, included not merely

taxes, but *any* form of indebtedness, legal or equitable, whether by simple contract, specialty, judgment or decree; that the United States was not bound by the Bankruptcy Act, whose provisions were *in pari materia* with the Act giving priority of payment to the United States; and that, therefore, the United States was entitled to a priority of payment in bankruptcy on account of a debt in nowise connected with taxes.

That case is conclusive on the point that except as modified by the Bankruptcy Act of 1898, the United States is entitled to a preference, not merely for taxes, but for any kind of debt however created, including, as here, a debt due under a contract.

2. The provisions of the act of 1797 were broadened and became R. S. 3466, which provides as follows:

“Sec. 3466. (Priority of debts due United States established.) Whenever any person *indebted* to the United States is *insolvent*, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, *the debts due to the United States shall be first satisfied*; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.”

The Bankruptcy Act of 1898 (30 Stat. 544), provided by Section 64 (Id. 563) as follows:

"Sec. 64. Debts which have priority.—a. The Court shall order the trustee to pay all taxes  
\* \* \*.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be \* \* \* (4) wages due to workmen \* \* \* not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

In *Guarantee Co. v. Title Guaranty Co.* 224 U. S. 152, the question arose whether a contract debt due the United States was entitled to priority over wages. *Lewis v. U. S.*, its construction of the Bankruptcy Act of 1867, and the effect thereon of the Act of 1797 (now R. S. 3466) were carefully considered and the following conclusions reached:

(a) That the priority given by the Bankruptcy Act of 1867 to all "debts due to the United States" was co-extensive with the priority given by the Act of 1797.

(b) But that the Bankruptcy Act of 1898 greatly changed the order of preference and gave to wages a priority above that of "debt owing to any person who by the laws of the States or the United States is entitled to priority."

(c) Therefore, that as the Bankruptcy Act of 1898 had carefully taken into consideration the whole range of the bankrupt's indebtedness, national, State,



and individual, and assigned the order of payment, it must be held that the order of payment prescribed in the Bankruptcy Act would prevail, even as against the priority of payment given by R. S. 3466 to "debts due to the United States."

3. There is but one conclusion to be deduced from the *Lewis and Guarantee Co. Cases*, to-wit:

(a) That the order of priority of payment or preference prescribed in the Bankruptcy Act of 1898 must prevail, even as against the priority given to the United States by R. S. 3466.

(b) That after the prior payment in full of the debts given preference by the Act of 1898, to-wit, (a) taxes, (b) preferred debts, consisting of the cost of preserving the estate, filing fees in involuntary cases, costs of administration and wages earned within three months not exceeding \$300 to each claimant, there should next be paid, in advance of general creditors, the following, to-wit (30 Stat. 563, Sec. 64 b (5) ),

"debts owing to any person who by the laws of the States or the United States is entitled to priority."

By the law of the United States, R. S. 3466, the United States is expressly given priority in bankruptcy cases.

Therefore, it cannot be questioned that the United States is entitled to have its claim of \$328,017.72 allowed as a prior claim ahead of any general creditors.

4. The following further question then arises: Does R. S. 3466 operate to give to the United States a priority (within priorities) over any other person who "by the laws of the States or the United States is entitled to priority," or is the United States' debt to be of equal dignity with, and to share *pro rata* with, all other debts having priority by the laws of the States or the United States?

The situation is thus presented where, under the Bankruptcy Act of 1898, the United States and a limited number of other preferred creditors are concededly entitled to be paid "in full" before the general creditors can get anything. But by R. S. 3466, [which must be considered as *in pari materia* with the 1898 Bankruptcy Act *Lewis v. U. S.* 92 U. S. 618, 622; *Guarantee Co. v. Title Guaranty Co.* 224 U. S. 152, 158] "debts due to the United States shall be first satisfied." Consequently, as between creditors, who under the Bankruptcy Act of 1898 are otherwise on an equal footing as to priority, nevertheless, R. S. 3466 operates to compel any debt due to the United States to be "first satisfied."

The judgment below should be reversed and the claim of the United States should be decreed to be paid first, after the payment of those classes of claims prescribed in Section 64 a, b, (1), (2), (3), (4).

## CONCLUSION.

In the Sloan and Astoria cases the decree and judgment should be respectively affirmed.

In the Eastern Shore case the order should be reversed and the cause remanded with instructions to grant the preference herein claimed.

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MARCH 9, 1922.



U. S. Supreme Court, U. S.

FILED

MAR 14 1922

WM. R. STANSBURY

CLERK

IN THE

# Supreme Court of the United States,

No. 526 October Term, 1921.

IN THE MATTER

*of*

THE EASTERN SHORE SHIPBUILDING CORPORATION,

Bankrupt,

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION,  
REPRESENTING THE UNITED STATES OF AMERICA,

Petitioner,

vs.

ROGER B. WOOD, Trustee in Bankruptcy,

Respondent.

## BRIEF FOR RESPONDENT

ROSENBERG & BALL,

Solicitors for Respondent.

GODFREY GOLDMARK,

Counsel.



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**Supreme Court of the United States,**

OCTOBER TERM, 1921.

In the Matter	
<i>of</i>	
THE EASTERN SHORE SHIPBUILD- ING CORPORATION, Bankrupt,	
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORA- TION, Representing the United States of America,	} No. 526.
Petitioner,	
<i>against</i>	
ROGER B. WOOD, Trustee in Bank- ruptcy, Respondent.	

**BRIEF FOR RESPONDENT.**

This case comes here upon a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit which Court affirmed an order of the United States District Court for the Southern District of New York. The order of the District Court, in turn, affirmed an order of the Referee in Bankruptcy which latter order denied the petition of the United States Shipping Board Emergency Fleet Corporation that a debt due it

from Eastern Shore Shipbuilding Corporation, the bankrupt be allowed priority over the debts due to general creditors of the bankrupt.

The references are to pages of the record in this court and the italics are ours.

As formulated by the Court below, two questions of law are presented (R., p. 89).

1. "Is the United States Shipping Board Emergency Fleet Corporation, organized under the laws of the District of Columbia for and on behalf of the United States in connection with the world war, such an agent of the United States that a debt due to it from the bankrupt is in fact and in law a debt due to the United States; and is the corporation as representing the United States entitled to claim whatever right of priority of payment the United States might be entitled to assert in the case of a debt owing to the Government?"
2. If the court finds that the Fleet Corporation is such an agency, and may assert such rights to priority as the United States has, is the United States itself, under the Bankruptcy Act, entitled to prior payment of ordinary debts due to it as against the general creditors of the bankrupt?"

#### **Statement of Facts.**

On August 22, 1918, a contract was entered into between the Fleet Corporation and the Eastern Shore Shipbuilding Corporation for the construction of six wooden harbor tugs (R., p. 53). The Eastern Shore Corporation was to receive \$146,-

500 for each tug, to be paid in instalments as the work progressed. After the signing of the Armistice, work under the contract was temporarily suspended, but it was later resumed under a supplemental contract (R., p. 73). The Eastern Shore Corporation was adjudicated a bankrupt on March 20, 1919 (R., p. 34). None of the six tugs was completed at that time. The Eastern Shore Corporation had been paid under the contract, on account, the sum of \$428,017.72 (R., p. 13). Thereafter, the Fleet Corporation expended additional sums in order to launch the tugs and then removed them from the yards of the Eastern Shore Corporation.

On September 2, 1919, the Fleet Corporation filed its petition with the Referee-in-Bankruptcy, wherein it prayed for an order authorizing it to take possession of materials and supplies in the shipyard plant of the bankrupt upon the ground that under the terms of contract, title to such material was in the Fleet Corporation, and it also prayed that its claim be allowed a priority upon the ground that it was an agency of the United States (R., p. 3).

Hearings were had before the Referee, but as the Fleet Corporation could not identify the material, its claim for reclamation was withdrawn. The Referee found the value of the tugs at the time of the bankruptcy \$100,000, and, accordingly, he allowed the balance of \$328,017.72 as a general claim against the bankrupt estate, but disallowed priority to the claim on the ground that the debt represented thereby was not a debt due the United States (R., p. 78).

The petition for reclamation and priority was presented by the Fleet Corporation in its own name, and not until after the Referee had denied its petition did the Corporation commence

describing itself as representing the United States, evidently with the hope that thereby its true status might be altered.

**Applicable Statutes as to Priority.**

The right to priority is statutory (*U. S. vs. Bank of N. C.*, 6 Pet., 29, 35), and accordingly the following statutes are material in determining whether the debt, no matter to whom due, is one entitled to prior payment.

Section 3466 of the Revised Statutes provides as follows:

“Priority established.—Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.”

Section 64 of the Bankruptcy Act provides:

“The court shall order the trustee to pay all *taxes* legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the Court may allow; (4) wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority."

**Provisions of the Contract showing distinct rights of the Fleet Corporation and the United States.**

Throughout the contract (R., page 54), the Fleet Corporation is referred to as the "Owner" and the provisions of the contract carefully discriminate between the "Owner" and the "United States of America." For example, the contract

provides (R., p. 61) the time shall be extended if the work is delayed, through delay or neglect of the Owner or by reason of alterations and additions by the Owner or "the commandeering by the United States Government of materials."

At R., p. 61, insurance was to be payable to the Owner and the Contractor as their interests may appear.

*At R., p. 62, it is provided that title to all vessels, either completed or under construction, in so far as inspected by the owner, "shall be in the United States of America," and that the title to all material for the furtherance of the work by whomsoever contracted for or assembled or used in the construction shall be in the "Owner" at all times. It was under this provision that reclamation of material was attempted (R., p. 3).*

At R., p. 63, it is provided that the contractor shall carry the work along with all possible dispatch, shall give it precedence "subject only to the prior rights, if any, of a department of the United States of America."

At R., p. 73, the supplemental agreement provides that the Contractor will make no claims for damages against the *Owner* by reason of the suspense order following the Armistice.

The designation of the Fleet Corporation as Owner and all these provisions indicate that it was the intention that the corporation as Owner should have rights and obligations distinct from those of the United States.

The original contract describes the Fleet Corporation as "representing the United States of America" but the two supplemental contracts contain no such description, thus indicating that these words were not deemed to have any materiality or at most indicating that the Fleet Corporation represented the interests of the United

States in the sense that any corporation represents the interests of its stockholders even though it does not act legally as their agent.

### **History of the Fleet Corporation.**

On September 7th, 1916, the Shipping Board Act (39 U. S. Statutes at large, 728) became a law. The title of the act was as follows:

“An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary, and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes.”

It provides in Section 3 for the appointment of the United States Shipping Board to be composed of five commissioners. By Section 5, the Board, with the approval of the President, is authorized to have constructed and equipped, or to purchase, lease or charter vessels suitable as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or army transports, or for other naval or military purposes. The commission was given authority to regulate the affairs of carriers on water, to require the filing of rate agreements, and, broadly speaking, to act with respect to shipping as the Interstate Commerce Commission and the State Commissions act with respect to carriers and public utilities on land. The Act, Section 11, provided for the formation of a Shipping Corporation, if found necessary, as follows:



“That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. *The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein; Provided,* that no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board. \* \* \*

“At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. *The vessels and other property of any such corporation shall revert to the board.* The board may sell, lease, or charter such vessels as provided

in section seven and shall dispose of the property other than vessels on the best available terms, and, after payment of all debts and obligations, deposit the proceeds thereof in the Treasury to its credit. *All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten."*

Section 13 of the Act provided for a bond issue of \$50,000,000 in the following language:

"That for the purpose of carrying out the provisions of sections five and eleven no liability shall be incurred exceeding a total of \$50,000,000 and the Secretary of the Treasury, upon the request of the board, approved by the President, shall from time to time issue and sell or use any of the bonds of the United States now available in the Treasury under the Acts of August fifth, nineteen hundred and nine, February fourth, nineteen hundred and ten, and March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed \$50,000,000; Provided, that any bonds issued and sold or used under the provisions of this section may be made payable at such time within fifty years after issue as the Secretary of the Treasury may fix, instead of fifty years after the date of issue, as prescribed in the Act of August fifth, nineteen hundred and nine.

"The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the Treasury to the credit of the board,

and are hereby permanently appropriated for the purpose of carrying out the provisions of sections five and eleven."

On April 16th, 1917, and in pursuance of the provisions of Section 11 of the foregoing Act, the petitioner herein, the United States Shipping Board Emergency Fleet Corporation, was organized under the laws of the District of Columbia. The corporate purposes were stated as follows:

"*First.*—That the corporate name of the Company shall be United States Shipping Board Emergency Fleet Corporation and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance and operation of merchant vessels in the commerce of the United States and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said sub-chapter four (4) of the incorporation laws of the District of Columbia."

All of the stock of the Fleet Corporation has been issued and the United States Shipping Board, representing the United States of America, is the record holder of all of the outstanding shares, except that the directors of the Company now are, and always have had standing in their name as stockholders of record, one share of stock each (R., p. 34, *et seq.*).

The Urgent Deficiencies Appropriation Act of June 15, 1917 (C. 29, 40 Stat. 182), authorized the President to place an order for ships or material as the necessities of the Government, to be deter-

mined by the President, might require, and authorized him to exercise the power and authority vested in him and to expend the money appropriated under the Act through such agent or agents as he should determine from time to time.

The Act then contains the following proviso:

“Provided that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended.”

By executive order of July 11, 1917 (R., p. 47), the President, by virtue of the authority vested in him by the foregoing Act, directed that the Fleet Corporation should have and exercise all power and authority vested in him in the said section of the Act, in so far as applicable to and in furtherance of the construction of vessels, and in furtherance of the purchase of material for ship constructions, and further directed that the United States Shipping Board should have and exercise all power and authority vested in him in so far as applicable to and taking over of title or possession by purchase or requisition of constructed vessels. This order is set forth at length at page 47 of the record.

#### **The Practical Importance of the Questions Presented.**

While the legal status of various corporations employed by the Federal Government during the past few years has been the subject of much discussion, the precise questions here presented have received no consideration in any other case. They are of the utmost importance.

These various corporations were formed prior

to and after the entry of this country into the world war. Contracts running into millions of dollars were executed by the officers of these corporations. Many of such contractors within the past year have become bankrupt owing large sums not only to the corporations of the class indicated, but to private creditors. If the debts due these various corporations so formed are to be given priority in bankruptcy, it will in many instances mean that the private creditors who entered into their contracts relying upon the general assets of the corporation as a fund which would be ratably distributed, will find they will receive no dividend in distribution because, perhaps unbeknown to them, the bankrupt had made some form of contract with one of the corporations formed by the Government during the war period. It means that general creditors of bankrupts will bear war time expenses and that such expenses will not be borne by all the people out of general revenues. Unless there is the clearest Congressional intent disclosed that the debts due the Fleet Corporation are to receive priority, this Court, it is urged, should be loathe, indeed, to lay down a rule which will be so contrary to the principles and purposes underlying the Bankruptcy Statute.

Although the Bankruptcy Act has been in effect since 1898, it appears there is no authoritative decision holding that even the United States of America itself is entitled to prior payment of debts due it as distinguished from unpaid taxes.

An analysis of the various bankruptcy acts and the decisions thereunder hereafter to be made, will, it is believed, indicate that it was the intention of Congress in enacting the Bankruptcy Act of 1898 to give to the United States of America itself no preference over ordinary creditors, ex-

cept for taxes necessary for the maintenance of Government.

### **Brief of Argument.**

*Since if the debt is one due the Fleet Corporation and not the United States, there is no right of priority because none is provided by any statute, and since the claim that the debt is due the United States must arise either (1) because the United States is the sole stockholder of the Fleet Corporation or (2) because the United States is, by some other means, made the principal in the contract of August 22, 1918, the Respondent urges the following points:*

I.—The Fleet Corporation as a private corporation is a distinct entity and contracts made by it are not to be deemed made by the United States of America merely because all or a majority of its stock is owned by the United States.

(a) The Fleet Corporation is, in every legal sense, a private corporation.

(b) The mere stock ownership by the United States in the private corporation does not make the contract one with the United States, and does not make the debt due to the United States.

II.—The Fleet Corporation did not operate as an officer or agent of the United States.

(a) The legislative scheme of its creation and endowment with powers shows that no such status was intended.

(b) The Shipping Fund Provision of the Urgent Deficiencies Appropriation Act of June 15, 1917, and the Executive Order of July 11, 1917, do not change the status created by the earlier legislation.

(c) The actual operations of the Fleet Corporation show that it functioned as a private corporation and performed acts and exercised rights and powers distinct from those of the United States. Its gross assets which include the debt due from the bankrupt belong to the Fleet Corporation and only the net assets of the corporation are payable to the United States on dissolution.

(d) The Fleet Corporation contracted as a principal and independent contractor by the very terms of contract of August 22, 1918.

III.—Even if the claim in question were to be deemed a debt due the United States and provable by the Emergency Fleet Corporation, nevertheless, ordinary debts due the United States as distinguished from taxes are not entitled to prior payment under the Bankruptcy Act of 1898.

#### **POINT I.**

**The Fleet Corporation as a private corporation is a distinct entity and contracts made by it are not to be deemed made by the United States of America merely because all or a majority of its stock is owned by the United States.**

##### **A.**

**The Fleet Corporation is in every legal sense a private corporation.**

The Fleet Corporation was formed pursuant to the General Corporation Law of the District of Columbia. Congress did not create a corporation

by a special act, but deemed it advisable to make use of the General Corporation Statute and authorized the incorporation by Section 11 of the Shipping Act of 1916. The Certificate of Incorporation (Record, p. 517) indicates that it was intended to be a private business corporation, for its objects, as described in Paragraph "First," are:

"That the corporate name of the Company shall be United States Shipping Board Emergency Fleet Corporation and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance and operation of *merchant vessels in commerce of the United States* and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and *profitable conducting* of said business as authorized by the laws of Congress, *and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations* under said subchapter four (4) of the incorporation laws of the District of Columbia."

The powers conferred by the laws of the District of Columbia upon corporations (Act of March 3, 1901, 31 Stat. at Large Chap. 854, subchap. 4) in general, include the power to make contracts enforceable by and against the corporation and the capacity of suing and being sued. The corporation law provides that a corporation organized thereunder "shall be a body politic and corporate, in fact and in name \* \* \* and capable of suing and being sued in any court of equity \* \* \*."

The corporation thus formed was not necessarily by virtue of the law under government control, but by virtue of the General Statute was under the control of its directors who were re-



quired to be stockholders (Section 608 of the Act), *but who may or may not be government officials.*

The importance of this point is illustrated by the following incident:

After March 4th, 1921, the directors of the Fleet Corporation were no longer government officials. Prior to that day, the members of the Shipping Board were the directors of the company, but on that day they ceased to be the members of the Shipping Board because their nominations had not been confirmed by the last Senate and thereupon ceased to be government officials. Nevertheless, these gentlemen remained directors of the Fleet Corporation and still deemed themselves such, for on March 4, 1921, they addressed a communication to the new President in which they stated that despite the fact that they were no longer members of the Shipping Board, they were still trustees (directors) of the Fleet Corporation and that, as such, they could not leave the corporation until there was someone to whom they could transfer their stock. In other words the directors of the corporation appreciated the fact that they were the directors of a private corporation and that the mere fact that they were no longer governmental officials did not relieve them from their duties as directors.

The certificate of incorporation conferred authority to do all things for the "profitable" conducting of the business. Thus financial benefit was one of its declared objects. The corporation could purchase, construct, equip, lease, charter, maintain and operate merchant vessels and by virtue of its general powers could purchase harbor tugs which might be needed as an incident to such business. It was passed in 1916 and as its title indicates, was for the purpose of:

"encouraging, developing and creating

\* \* \* a merchant marine, to meet the requirements of the commerce of the United States."

The business thus authorized was not peculiarly a governmental business and the powers vested in the corporation were commercial and industrial and, in no wise, essentially different from similar activities of other private corporations. Had there been private stockholders they would have been entitled to their share of the corporate profits.

The Shipping Act and the Company's charter will be searched in vain for any provision indicating that the corporation or its stockholders (whether the United States or private persons) should have rights, privileges or obligations different from any other corporation formed under the laws of the District of Columbia with respect to its general business operations. If Congress had intended otherwise, it could have so provided, as it did with respect to the corporate life of the company.

As was said in *Lord and Burnham vs. U. S. S. B. E. Fleet Corp.*, 265, Fed., 955:

*"It must be assumed, from the very fact of the provision for the incorporation of the defendant, that it was intended that it should be a real corporation, with all its powers, rights, and obligations intact. To hold otherwise would be to hold that Congress did the wholly purposeless thing of incorporating a corporation, which should not be a corporation at all, to perform, under the board, things which, as a governmental agency, the board had ample authority to do."*

The real reason underlying the use of corporations during the war period is well stated by

Judge Mayer in the *Sugar Equalization Board* case, 268 Fed., 575, 587, where he said:

“The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corporations. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign.”

It must follow that the Fleet Corporation is a mere private Corporation.

#### B.

**The mere stock ownership by the United States in the private corporation does not make the contract one with the United States, nor does it make the debt due to the United States.**

Since the decision in the *United States Bank vs. Planters Bank*, 9 Wheaton, 904, it has been established that a private corporation in which the Government is a stockholder, does not become

*ipso facto* a governmental agency and thus entitled to the privileges and immunities of the sovereign. In that case, the State of Georgia was the incorporator of the Bank and a stockholder, and it was claimed that because of these facts a suit against the bank was a suit against the State of Georgia.

Chief Justice Marshall said, 9 Wheaton, 904, 906:

“The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters’ Bank of Georgia is not the State of Georgia, although the state holds an interest in it.

“It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suitable, even in their own court; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the cor-

poration, than are expressly given by the incorporating act.

*"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter. We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the Federal Courts, by the circumstance that that state is a corporator."*

The principle underlying the foregoing case was applied to the Fleet Corporation by this Court in *U. S. vs. Strang*, 254 U. S., 491, so that further discussion is unnecessary. This Court said:

*"Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity \* \* \*. Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. Bank of the United States vs. Planters' Bank of Georgia, 9 Wheat., 904, 907, 908; Bank of Kentucky vs. Wister, 2 Pet., 318; Briscoe vs. Bank of Kentucky, 17 Pet., 257; Salas vs. United States, 234 Fed. Rep., 842 \* \* \*."*

It is clear, therefore, that the United States Shipping Board, representing the United States, as a record holder of the issued capital other than

the director's shares, had no other status as a stockholder than if it were a mere private individual, and the contract between the bankrupt and the Fleet Corporation cannot be deemed to be the contract of the United States merely because the latter, for the time being, owned all or nearly all of the capital stock. *Congress knew that under the provisions of Section 11 stock of the par value of millions of dollars could be held by private individuals.*

From the foregoing discussion it must follow that the debt is not due to the United States because it is the chief stockholder in the Corporation.

## POINT II.

**The Emergency Fleet Corporation did not, in a true sense, operate as an officer or agent of the United States.**

### A.

**The legislative scheme of its creation and endowment with powers shows that no such status was intended.**

As the fact that the United States is a stockholder does not make the debt due the corporation one due to the stockholder, the whole claim for priority must rest upon the contention that in some other manner and by some further means the Fleet Corporation was constituted a true officer or agent of the United States and in executing and performing the contract, through its own officers, was acting as such agent.

*If the Fleet Corporation was the agent of a disclosed principal and the contract was one enforceable by or against the United States in its own name, then the carefully devised plan as contained in the Shipping Act to make use of a private corporation formed under a general law is wholly without meaning.* As well might government officials have contracted without the intervention of the Fleet Corporation, just as they always had contracted. There is certainly nothing in the Shipping Act or in any subsequent legislation and orders (if they are pertinent) which indicates that the Fleet Corporation should contract other than in its own name just as any private corporation. That was the purpose of its creation. It was to be free from the restraints and checks incident to ordinary government contracts. It was to have separate rights and obligations.

If there was no authority to contract for the government as principal or no intention that it should, then the declaration in the contract that the Fleet Corporation represented the United States cannot create such an agency relation. It is of course possible, the draftsman of the contract may have had in mind simply the fact that as principal stockholder, the United States was the beneficiary of the contract and that from a lay point of view the Fleet Corporation did represent the United States or may have realized that the corporation was perhaps an instrumentality to effectuate a Federal power. As already indicated, the supplemental contracts contained no such recital.

When the principle which underlies the decision in *U. S. vs. Strang*, 254 U. S., 491, is considered, it appears that contracts of the Fleet

Corporation are not contracts of the United States.

Justice McReynolds states the government contention as follows:

“Counsel for the Government maintain that the Fleet Corporation is an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested by Congress in the President and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector Strang necessarily acted as agent of the United States.”

That contention in its essence is the contention of the petitioner here.

Unless this court clearly determined that the Fleet Corporation is not of necessity a true agent of the United States in the making of contracts, why did it point out the distinctions which were necessary in order to reach the conclusion that Strang was not a sub-agent and therefore had not violated the statute? Here was a statute most salutary in character. Every evil which could arise were Strang deemed to be an agent of the United States *as for example an officer of the Shipping Board itself* would arise were he technically only an employee of the Corporation. The Fleet Corporation had many officers, agents, employees who were in exactly the same degree subject to the temptations which this penal provision sought to remove. Nevertheless, the Court interposed the corporate entity as a bar to the applicability of the statute and looked upon the em-



ployee just as if he were appointed by a private corporation which was an independent contractor because as the Court said of the Fleet Corporation:

"Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only and *could contract only for it*. In such circumstances we think they were not agents of the United States within the true intendment of Section 41."

It is not believable that any such distinction would have been drawn between Fleet Corporation employees and employees of the Shipping Board, for example if the court had deemed the Fleet Corporation contracts in any sense true government contracts.

#### B.

**The Shipping Fund Provision of the Urgent Deficiencies Appropriation Act of June 15, 1917, and the Executive Order of July 1, 1917, do not change the status created by the earlier legislation.**

Much has been said by the petitioner with respect to this act and order. It is asserted that it must be presumed that the contract with the bankrupt was made by the Fleet Corporation in pursuance of the power vested in it by this order and that therefore it acted as a true government agent in the exercise of the Government's war powers and not as a principal or independent contractor.

*In the first place there is no evidence in this case that the tugs were ordered by the Fleet Corporation as delegate of the President under his executive order. There is no evidence of com-*

mandeering. For ought that appears the tugs were purchased for the furtherance of the general operations of the corporation.

The original Act of 1916 provided for an appropriation of \$50,000,000. The capital stock of the company in that amount was paid for from this appropriation. There is no evidence that one dollar of the money paid over to the bankrupt came from the Emergency Shipping Fund Provision of the Urgent Deficiency Appropriation Act of June 15, 1917, or that in entering into the contract, the Fleet Corporation acted as a delegate of the President under the Act just referred to and the Presidential orders predicated thereon. The presumption is that the Corporation was acting under its charter powers and not otherwise. (*Eichberg vs. U. S. S. B. E. F. Corp.*, 273 Fed., 886, 892).

*However as the petitioner's contention here is almost wholly based on the assumption that the contract was made in pursuance of the Act and Executive order of 1917, the question will be discussed on that assumption.*

It is of course true that Congress in enacting the Act of 1917 expected that the President might use the Fleet Corporation to carry out the powers delegated to the President but it was the intention that the Fleet Corporation was to be used just as any other private Corporation for as said in *The Lake Monroe*, 250 U. S., 246, 254:

“And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the general powers that already

had been conferred upon them by law, and because they were subject to the regulatory provisions that Congress had enacted."

Under the Act of 1917 and the orders of the President based thereon, the only delegation of power to the Fleet Corporation here material was the delegation of the war powers of Congress to order ships and to compel compliance with such orders. For that purpose the Act of June 15, 1917, provided that money was appropriated for the Fleet Corporation, i. e., the money was advanced or loaned to the corporation to be spent as other moneys of the corporation. But this did not mean that the corporate entity was to be ignored and that the assets of the Fleet Corporation became government property or that moneys due the corporation were moneys due the government. As well might it be said that when a railroad in which a state may or may not be a stockholder and which it may or may not have subsidized, exercises the State's power of eminent domain under delegation from the legislature, the corporation which exercises them is a government agent and that the awards in condemnation are to be collected from the State as principal because the public will be benefited by the improvement.

In *Luxton vs. North River Bridge Co.*, 153 U. S., 525, the power of Congress to create a corporation to build a bridge to cross navigable waters was upheld under the powers to regulate commerce. The Act creating the corporation gave it power to condemn property. The corporation was nevertheless, in a legal sense, a private corporation.

Undoubtedly using the term in its broad sense the Fleet Corporation was an "agency" or instrumentality employed to carry out a Federal power.

But to assume that the true relationship between the United States and the Fleet Corporation is determined by asserting that the Fleet Corporation is a "Federal Agency" and that the United States must, therefore, be the principal under the contract with the bankrupt and the debt accordingly due to the United States, is a mere substitution of a phrase for underlying principles. The Federal Government in order properly to exercise the powers and duties delegated to it must of necessity, employ various "agencies" but it, by no means, follows that such agencies thereby become of necessity officers or agents of the United States in the strictly legal sense, so that the acts and contracts of the agency become acts and contracts of the United States and so that the United States is a true principal and the "agency" a true agent. That contention was rejected in the *Strang* case.

Since *McCulloch vs. Maryland*, 4 Wheat., 316, it is settled that the Federal Government may employ such means as it finds necessary and appropriate in aid of its express powers, and to that end, may create corporations, but never before has it been argued that a corporate entity thus created may be brushed aside and the acts, assets and obligations of the corporation deemed to be those of the United States. Although the Bank of the United States was held to be a Federal agency in *McCulloch vs. Maryland*, yet, as stated in the *Planters Bank* case, 9 Wheat., 907, the privileges of the government were not imparted to the corporation by the circumstance that the government held shares in the bank.

In *Briscoe vs. Bank of the Commonwealth*, 11 Pet., 257, the Bank of the Commonwealth of Kentucky was established by the Legislature of that State under an Act providing that the President

and Directors shall be chosen by the Legislature; that it should be a corporation capable of suing and being sued and that the bank should be the exclusive property of the Commonwealth. By subsequent act, the bank was authorized to issue notes in the common form of bank notes. The Bank sued Briscoe upon his note given in exchange for notes of the bank and Briscoe claimed that his note was void because the notes of the bank were "bills of credit" issued by the State of Kentucky in violation of the provision of the Constitution prohibiting the issuance of bills of credit by a State. This Court, however, rejected the argument that the bank, in emitting the bills, acted as agent of the State and that consequently the bills were issued by the State, and held that the bills were the obligations of the corporation; that the bank was not identical with the State; that the operations of the bank were not the operations of the State and that the bank was not the mere instrument of the sovereign to effectuate its designs (11 Pet., 323).

The Union Pacific Railroad Company was incorporated by Congress, Act of July, 1862, 12 Stat. 489, as an agency to carry out a Federal purpose and Congress made loans and donations to it. While its operations were not subject to State tax because it was a Federal Agency (*Railroad Company vs. Peniston*, 18 Wall., 15), nevertheless, it, of course, has operated as a private corporation. For as said in *Central Pacific Railroad vs. California*, 162 U. S., 91, 125:

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents,

subject to the limitations pointed out in *Railroad Co. vs. Peniston*, *Van Brocklin vs. Tennessee*, 117 U. S., 151, 177."

As said in the *Sinking Fund* cases, 99 U. S., 700, 719:

"This corporation [the Railroad] is a creature of the United States. It is a private corporation created for public purposes and its property, to a large extent, devoted to public uses. It is, therefore, subject to Legislative control, so far as its business affects public interests"

and at page 724:

"The United States occupies toward this corporation a two-fold relation, that of sovereign and that of creditor."

Under the Federal Land Bank Act, recently enacted and upheld in *Smith vs. Kansas City Title & Trust Co.*, 255 U. S., 180, the Secretary of the Treasury is authorized to subscribe to the stock of the bank, to use the bank as an agent in the fiscal affairs of the Government, but, as pointed out in the opinion below in the case at bar it hardly could be contended that these facts invested the bank with the privileges of the sovereign.

In *Commercial Pacific Co. vs. Philippine National Bank*, 263 Fed., 218, the defendant bank claimed to be a department of the Government, and that its officers and agents were officers and agents of the United States, and accordingly were entitled to the rights of the Government under the Post Road Act with respect to the sending of cables. The claim was rejected in a well reasoned opinion by Judge Mayer in the District

Court for the Southern District of New York. He said, at page 224:

“But, although in the complex problems attendant upon the administration of the Philippine government, in the interest of its welfare and that of the United States, the bank has, of course, many close relations with the United States government, nevertheless there may be private ownership to the extent of 49 per cent. of the stock of the bank, and it is permitted to do and does do a commercial business for profit, like any other bank. A financial institution so constituted cannot be a ‘department’ of the United States government or an ‘agent’ in the sense of section 5266 of the Post Road Act, *supra*.”

In *Panama Railroad vs. Curran*, 256 Fed., 768, in the Circuit Court of Appeals for the Fifth Circuit, an action for damages for negligence was brought against the railroad company and in defense it was urged that the company was an agency of the Government in the construction of the Canal. The railroad was a New York Corporation and all of the stock was owned by the United States, except the qualifying shares.

The Panama Canal Act, Section 6, authorized the President, through the Panama Railroad Company, or otherwise, to operate and maintain the properties, and provided that the moneys received from the conduct of the business might be expended and reinvested for corporate purposes, without being covered into the Treasury. The Court, in holding the defendant corporation subject to suit, said:

“Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inap-

plicable to Panama Railroad receipts provisions requiring payment into the Treasury of receipts by Governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the Government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent."

The War Finance Corporation was a Federal instrumentality created by Act of April 5, 1918, 40 Stat. C., 45. The Act provided that all of the corporation's capital stock of \$500,000,000 should be subscribed by the United States. Nevertheless, the Act provided that the corporation might sue and be sued and gave to the corporation the other general and usual powers which were granted to the Fleet Corporation under the corporation laws of the District of Columbia. The Act further provided that the United States should not be liable for the obligations of the corporation.

From the foregoing authorities it is apparent that a private corporation whether created directly by Congress or directed to be incorporated either under the laws of the State or under the District of Columbia, does not lose its character as a private corporation with the attendant rights and liabilities by the mere fact that the corporation is formed as an agency of the Federal Government to effectuate a Federal purpose. Of course incorporation under a general statute of a State or under the District of Columbia makes much clearer that the corporation so employed was in no wise different than any other private corporation.

In its final analysis, the real problem must be not whether the corporation is a Federal instru-



mentality but whether it was the intention of Congress, despite the fact that it has directed that a corporation be formed or employed to perform functions sometimes exercised by a government officer or a government Board or Commission, that the corporate entity should be ignored and brushed aside, so that the acts and contracts of the corporation which functions as any other private corporation, nevertheless should be deemed the acts and contracts of the government, and consequently that the debts due the corporation should be deemed to be due the Government. The history of the various corporations formed by Congress indicates that such was never the intention.

If it was the intention of Congress that the existing Fleet Corporation which it specifically authorized to be employed (Sec. 4, Act of June 15, 1917) should be none other, in nature and status, than a Government officer or Government board or commission, of which there were numbers already at hand, and that the corporate entity should be brushed aside, of what possible use was it to make use of this corporation at all?

It is submitted that the only conclusion possible is that the particular advantages shown by the following example were achievable in this manner and this manner only:

If the shipbuilding task with its infinite detail was to be performed by governmental officer, board or commission, it was recognized that it would be attended by all of the usual handicaps symbolized as "red tape" attendant on governmental departments. If, on the other hand, the task of contracting for ships were turned over to an existing private corporation as for example United States Steel Corporation controlled and managed by individuals not chosen by the Government no complete means were available for in-

sureing that the operation of this private corporation would at all times be subject to the control of Federal authority. By using the Fleet Corporation in which the government was at all times a majority and so controlling stockholder, it achieved successfully the same result as if it had said to the United States Steel Corporation: "To you is hereby delegated the task in your own name of contracting for and directing the building of ships for the United States. You will need money to advance to your shipbuilders; you will need money to operate your organization. In view of the immensity of the task, we need to have control of your organization. We shall, therefore, finance your corporation in these operations, in return, for which you shall, for the period of the war, transfer to us a majority of your stock or provide us with the voting control of the majority of your stock."

If in pursuance of such an arrangement, the United States Steel Corporation had contracted with the bankrupt for the construction of harbor tugs, making payments out of moneys made available by appropriation of Congress and providing that it should have title to materials as security for the money, is there any doubt that the Steel Corporation would have been deemed to be an independent contractor and a principal in the contract? Can the situation truthfully be said to be altered by mere virtue of the fact that the United States empowered the President to employ the existing Fleet Corporation, over which the United States had control through stock ownership, similarly to contract with the Eastern Shore Company, appropriating for that purpose moneys which, under the language of the Act, were to be employed as the other moneys of the corporation?

Under Section 2 of the Act of 1917, compli-

ance with orders placed under Section 1 was obligatory and under Section 4 the President was authorized to exercise this war power through such agencies as he might determine. Congress was careful to provide in Section 4, however, that moneys turned over to the Fleet Corporation were to be expended as other moneys of the corporation were expended. The intent was to vest the war power through the President in the private corporation for the public good to be exercised by it, just as the power of eminent domain is vested in the private railroad or public utility corporation and exercised by them. The moneys turned over to the corporation were to be expended by it, the debts due it became its property. The ships, when constructed, became the property of the United States, for the United States advanced the moneys to be used.

The statement of Judge Jackson in *U. S. vs. American Bell Telephone Co.*, 25 Fed., 17, (quoted with approval in *Peterson vs. Chicago R. I. and Pac. Railway*, 204 U. S., 364, at 393) applies here:

“For one person to supply means for another to do business on is not the doing of that business by the former.”

As is well said by the Supreme Court of Pennsylvania in 268 Pa., 92, and quoted with approval by the Court of Appeals of the District of Columbia in *Eichberg vs. U. S. S. B. E. F. Corp.*, 273 Fed., 886, 892:

“The Shipping Act provided for the formation of a corporation, with other minor provisions relative thereto, to carry out the purposes of the act. There is not a single line before us which has a tendency to show that the board conferred on the Fleet Corporation any of its many administrative or governmental duties; but when we turn to

the articles of association of this company we find the limit of this 'carrying out the purposes of the act' to be the 'purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business.' *That the President, under the emergency fund provision of the Urgent Deficiencies Act, designated this corporation to perform certain duties similar to those embodied in its certificate of incorporation, does not alter the real status of this concern, to wit, that it was an arm of the Shipping Board, functioning as a great industrial business corporation, with power to enact by-laws, vote its stock, deposit its money and securities, and declare dividends from the surplus and profits."*

### C.

**The actual operations of the Fleet Corporation show that it functioned as a private corporation and performed acts and exercised rights and powers distinct from those of the United States. Its gross assets, which include the debt due from the bankrupt, belong to the Fleet Corporation and only the net assets of the corporation are payable to the United States on dissolution.**

In determining whether the intention was to ignore the corporate entity and thus to make the debts due the corporation due to the United States the actualities cannot be overlooked.

There is no statute requiring that moneys received by the Fleet Corporation from its various activities be paid into the United States Treasury as and when received or to be held for its ac-

count. The ordinary overhead expenses and salaries of employees and officers of the Fleet Corporation and other payments are not required to be paid by government voucher, but are paid by the check of the Fleet Corporation out of its available funds. For this reason the Act of 1917 provided that moneys payable to the Fleet Corporation were to be disbursed as other moneys of the Company. To those familiar with the ordinary processes involved in the expenditure of government moneys the practical importance of this especial bit of "red tape" cutting will be obvious.

That Congress understood the general status of the Corporation is apparent from the provisions in Section 7 of the Appropriation Act of 1917, C. 79, 40 Stat., 345, 384, where it was provided that the Fleet Corporation should be deemed a government establishment for the purposes of transferring employees.

The gross receipts of the Fleet Corporation are not trust funds which are ear-marked and must be turned over to the government. It is the "property of the Corporation" then extant, its net assets, after the payment of all expenses, etc., which, after a dissolution of the corporation are payable by the Fleet Corporation to the Shipping Board under Section 11 of the Shipping Act of 1916, and it is only the net proceeds derived by the Shipping Board which are thereafter to be paid to the United States Treasury under Section 13 of the Merchant Marine Act of 1920.

Among the gross assets of the Fleet Corporation is the debt due from the bankrupt. *If and when such a debt is collected the proceeds will not be a trust fund which belongs as such to the United States, but such proceeds will be available for the general corporate purposes of the Fleet*

*Corporation, many of which at the present time are purely commercial.*

Under these circumstances, from both a legal and practical point of view, the debt due from the bankrupt is one due to the Fleet Corporation and not to the United States.

As a pertinent exemplar of the fulfillment of a quite contrary Congressional intent as to agency, and in particular as to the title to moneys, reference is made to the railroad situation under the operation of the Federal Control Act. This Act provides:

*"Moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control \* \* \*."*

In the *Matter of Hibner Oil Co.*, 264 Fed., 667, United States claimed that unpaid freight charges due from the bankrupt on oil shipments made over the New York Central Railroad which was being operated under Federal control, were the property of and constituted a debt due the United States.

The Trustee in Bankruptcy contended that under a correct interpretation of the above quoted act:

*"Uncollected transportation charges constitute a debt between the carrier and the bankrupt, and that when these charges are actually paid into the carrier, and when the books of the carrier have been*

closed and a balance struck and a surplus found to exist, that then, and not till then, is the money (surplus) the property of the United States."

The Court held, however, that the claim for freight charges was property derived from operation and therefore a debt due to the United States.

The foregoing case emphasizes the point made here that the debt was due to the Fleet Corporation and not to the United States, for under the Federal Control Act no corporation was employed but operation was under a Federal official and moneys and other property derived from operation of the carriers are expressly declared to be the property of the United States when received, and the provisions representing the custody of the moneys and the closing of the books are held not to limit the clause which vested title to the moneys derived from operation in the United States. Had such been the intention of Congress with respect to the Fleet Corporation, it would undoubtedly have been inserted in the legislation authorizing it. But, as pointed out, just the contrary was provided, for the moneys paid over to the Corporation were to be expended as its other moneys and only the property possessed by it at the time of dissolution becomes the property of the United States.

A situation illustratively analogous is found in *United States vs. Mason*, 218 U. S., 517, where it was held that the clerks of the Federal Courts are not controlled in respect to their fees and emoluments and accounting therefor by the provisions of the Revised Statutes relating to the embezzlement of public moneys by officers of the government. The basis of the decision is that the moneys are not received by the clerk as moneys

of the government, but as funds from which he received his compensation, and that as to the surplus, he is not a trustee but merely a debtor.

#### D.

**The Fleet Corporation Contracted as Principal and Independent Contractor by the very terms of the Contract of August, 1918.**

The contention that the Fleet Corporation was to function as a principal is further supported by the interpretation of its powers adopted by the officers charged with the duty of managing its affairs. This construction is entitled to weight. *LaRogue vs. U. S.*, 239 U. S., 62, 64.

An examination of the contract itself shows that the intention was to vest title to property and other rights and powers in the Fleet Corporation distinct from the rights and title of the United States and that accordingly the Fleet Corporation was itself a principal and not a true government agency which of course cannot occupy so completely an independent status distinct from the United States.

Throughout the contract (R., p. 53), the Fleet Corporation is designated as the "Owner" and the Eastern Shore Company as Contractor. The covenants in the contract are the Owner's. The contract, as already pointed out, carefully distinguishes between the Owner and the United States. *Unless the owner was contracting in its own behalf, such a distinction would be wholly meaningless.*

Following are provisions of the Contract:

**"DELAY (p. 61):**

If the Contractor be delayed or obstructed in the transaction or completion of the



work provided for by this contract by the delay, neglect or default of the Owner, or by reason of alteration or additions by the Owner, *or the commandeering by the United States Government of materials on the ground or materials purchased by the Contractor but not delivered* \* \* \* the time of delivery shall be extended for a period equivalent to the time lost by reason thereof."

"TITLE (p. 62):

It is agreed that title to all vessels, either completed or under construction, in so far as they shall have been inspected and approved by the Owner, *shall be in the United States of America, and that the title to all material for the furtherance of work under this contract, however and by whomsoever contracted for or assembled or set up in the shipyard or used in the construction of the work under this contract, shall be in the owner at all times.* Nothing contained herein, however, shall be construed as a waiver by the Owner of its right to direct the replacement of unsatisfactory workmanship and/or materials at the Contractor's expense."

"TIME OF ESSENCE (p. 63):

It is agreed by both parties that time is of the essence of this contract. The Contractor shall commence and carry through to completion the work under this contract with all possible dispatch, shall give precedence in its plant or plants to the work hereunder, subject only to the *prior rights, if any, of a department of the United States of America*, and will not enter into any other contract or undertake any other work or service which will interfere in any material manner with the completion of the work undertaken hereunder."

It was in pursuance of the provision as to title

in materials, that the petition herein was originally drawn in part as one in reclamation proceedings, thus indicating how important this provision was deemed to be.

If the Fleet Corporation was acting merely as agent, how could title to the materials for the furtherance of the work vest in the corporation and not in the principal?

The provision that title to the vessels completed or under construction should be in the United States was nothing more than an assignment by the Emergency Fleet Corporation to the United States of property not in existence.

In *U. S. vs. Ansonia Brass & Copper Co.*, 218 U. S., 452, an action was brought in the State court to determine liens on vessels in the course of construction for the United States. Under one of the contracts considered, there was a provision that the parts paid for under the system of partial payments provided should become the sole property of the United States, and it was held that the title of the Government was superior to all others and could not be impeded by the State Lien Law. In construing other contracts which contained no such clause, this Court held that title did not pass to the Government until the vessels were completed, and, accordingly, as to these, the State Lien Law was applicable. In the light of this case, the provision that title to the materials should vest in the corporation and that title in the finished vessels should vest in the United States, must have been deliberately inserted.

The provisions are determinative of the Corporation's real relation to the contract. As an entity distinct from the United States it was intended to and did have an actual beneficial interest therein. It was advancing the money to the

contractor and it retained title to the materials. The ordinary government agent, commission or board has no such interest or title. Here the Shipping Board was the true government agency and the act provided that on behalf of the United States the *Board* should subscribe to and vote the *Stock* of the Corporation.

As illustrative of the fact that the presence of title in the alleged agent or its absence is strongly relied upon as indicative of the true relationship, reference may be made to *Murray vs. Wilson*, 213 U. S., 151. In that case following the abolition of the State Board of Control or dispensary in South Carolina which had bought and sold liquors on behalf of the State, the legislature created a new board (not a corporation) which was given control of funds, assets and property of the former State liquor dispensary for the purposes of liquidation. Thereafter a bill in equity was filed against the new board which set forth claims for liquor sold and alleged that the act of the legislature creating the new board had placed the assets of the dispensary in the hands of the commission as a *trust fund* for the benefit of creditors which they could enforce without the presence of the state as party.

On behalf of the commissioners, it was contended that the suit was, in reality, one against the State and that the State had not consented to be sued. The Supreme Court sustained this defense because amongst other things it held that the State had originally been the purchaser of the liquor when bought by the dispensary and that the officers appointed to liquidate its affairs were merely State officers and that they had no title to the property of the dispensary.

The Court said, page 170:

“Aside from this, however, considering

the text of the winding up act, we are of opinion that there is no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to *manage* the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State."

Thus the important question was in whom title to the property was vested. In the Murray case the Board simply *managed* the property. Here the assets of the Fleet Corporation belong to the Corporation as a distinct entity. That was the purpose of forming a corporation as distinguished from a mere governmental board. The corporate title cannot be ignored. It is recognized by the provision in Section 11 of the Act that on dissolution the "*property of the Corporation*" shall revert to the Board. This provision was in nowise affected by the legislation and executive order of 1917.

It is conceded that suit may not be maintained at law or in equity against a mere governmental official or board as such where it is sought to recover property, the title to which is vested in the State. It is conceded that such officials and boards may only be proceeded against by mandamus to compel performance of ministerial acts and by injunction to prevent the performance of illegal

acts or to prevent the enforcement of unconstitutional statutes where property rights are invaded. These principles are elementary but not pertinent. The basic distinction rests in the fact that the Emergency Fleet Corporation took title to moneys appropriated to it, provided in the contract for title to materials until ships were finished when there was an equitable assignment thereof to the government and provided, further, that insurance moneys were payable to it. The assets were the assets of the Fleet Corporation, its funds were to be disbursed free from government restraints, and its capital was a trust fund just and only as in the case of any corporation formed under the laws of the District of Columbia. It was the property of *the Corporation* which was to revert to the Board on dissolution.

Further evidence that Congress did not deem the corporation a true agency was pointed out in the *Strang* case where the Court said:

“The view of Congress is further indicated by the provision in Section 7, Appropriation Act of October 6, 1917 (40 Stats., 245, 384)—‘Provided that the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment *for the purposes of this section.*’ Also, by the Act of October 23, 1918 (Ch. 194, 40 Stats., 1015), which amends Section 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock.”

It is submitted, therefore, that an analysis of the history of the corporation, of its practical operation and of the transaction here involved shows that the Fleet Corporation was not intended to be and was not, in fact, a true governmental

agency but was intended to and did function as the ordinary private corporation; that it contracted as a principal and independent contractor here and that the debt due from the bankrupt was due to it and not to the United States. As there is no statute providing for prior payment of debts due the *Fleet Corporation*, the petition for prior payment was properly denied.

### POINT III.

**Even if the claim were to be deemed a debt due the United States of America and provable by the Emergency Fleet Corporation, nevertheless ordinary debts due the United States as distinguished from taxes are not entitled to prior payment under the Bankruptcy Act of 1898.**

Although the Bankruptcy Act has been in effect since 1898, the right of the United States to prior payment of ordinary debts due it as distinguished from taxes before the payment of debts due private creditors, has not been authoritatively adjudicated.

This Court held in *Guarantee Company v. Title Guaranty Company*, 224 U. S., 152, that the priority granted to the United States by Section 3466 of the Revised Statutes despite its general language did not entitle the government to the prior payment of its claim over the claim of a laborer given priority under Section 64 of the Bankruptcy Act of 1898.

In that case it was said:

“The act takes into consideration, we

think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment."

The questions now presented and not expressly decided in the *Guarantee Co.* case are:

(a) Within the meaning of Subdivision 5 of Section 64 of the Bankruptcy Act, is a debt owing the United States "owing to any *person* who, by the laws of the States or the United States, is entitled to priority" and therefore to be paid before the debts of general creditors?

(b) If the United States is not such a person, are the provisions of Section 3466 of the Revised Statutes despite the above quoted deliberate statement of this court, to be read into the Bankruptcy Act as Subdivision 6 so that an ordinary debt due the United States is to have priority, after the priorities provided in the Bankruptcy Act and before the payment to general creditors, or are the priorities granted by the Bankruptcy Act exclusive?

A consideration of the history of the various bankruptcy acts and of the changes made from time to time, it is believed will show that since 1841 whenever Congress has intended the United States to have a preference as to ordinary debts, it has provided such preference in the current bankruptcy act itself, separately from any provisions as to preference in bankruptcy of debts due any *person* preferred by Federal or State Statutes and without relying upon the priority apparently granted by Act of 1797, which thereafter became Section 3466 of the Revised Statutes.

The Bankruptcy Act of April 4, 1800, Vol. 5, p. 82, provided in Section 62 as follows:

“And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.”

In construing this Act in conjunction with Section 5, of the Act of March 3, 1797, from which Section 3466 of the Revised Statute has been derived, without material change, this Court held in *United States vs. Fisher*, 2 Cranch, 358, that the Government obtained its priority not from the Bankruptcy Act, but because that Act specifically continued, in effect, the rights of the United States under the Act of 1797.

#### **The Bankruptcy Act of 1841.**

Here is found the first Bankruptcy Act which provided for the prior payment of debts due the *United States*, and separately for the prior payments of debts to *persons* having a preference. The Act (Collier, 11th Ed., page 1545) provided in Section 5 as follows:

“And be it further enacted, that all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects pro rata, without any priority or preference whatsoever, except only for *debts* due by such bankrupt to the *United States*, and for all debts due by him to *persons* who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets \* \* \*”



This provision does not seem to have been interpreted and the Act was repealed in 1843.

**Act of 1867.**

This Act (March 2, 1867, 14 Stat., 530, C. 176) clearly indicates that Congress had in mind the distinction between ordinary debts due to the United States, moneys due as taxes and assessments under the laws thereof and debts due persons having preference by the laws of the United States.

In Section 28 it is provided:

“In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:

*First.*—The fees, costs and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

*Second.*—All *debts* due to the *United States*, and all *taxes* and assessments under the laws thereof.

*Third.*—All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.

*Fourth.*—Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

*Fifth.*—All debts due to any *persons*, who by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed; always provided, that nothing contained in this act shall interfere with the

assessment and collection of taxes by the authority of the United States or of any State."

Here is a clear recognition of the distinction between debts due the United States and taxes and assessments under the laws thereof, and of course, the specific reference to debts due to the United States in the second subdivision makes it clear that it was not intended to include debts which were due to the United States itself within the fifth subdivision giving priority to debts due persons entitled to such under the laws of the United States, for if this were the intention, subdivision two would have been unnecessary.

The priority given the United States by this Act was apparently coextensive with that given by the Act of 1797, both including debts (as distinguished from taxes) and also taxes.

In *Lewis, Trustee, vs. United States*, 92 U. S., 618 (1875), the Supreme Court considered the two sections and after quoting the Act of 1797, said at page 622:

"The clause above quoted is in pari materia with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and reaffirm the rights which those statutes give, and to exclude the possibility of a different conclusion."

Under this interpretation, it is apparent that the Bankruptcy Act of 1867 neither added to nor took away from the Act of 1797 for they both provided for the prior payment of debts to the United States and were not in any way inconsistent. In view of this construction the act of 1898 would

have contained the same language if the intention had been the same.

### **Bankruptcy Act of 1898.**

The act of 1898 worked a radical change in the specific preferences accorded by the earlier Bankruptcy Acts of 1867 and 1841. It made numerous references to the United States; it made exact provision for its status and rights under varying circumstances. The intention was to include within this statute itself all rights that the United States was to have in the estates of bankrupts.

That claims of the United States of all classes are within the purview of the 1898 Act is clear from its very language.

“Section 1 \* \* \* (9) Creditor shall include anyone who owns a demand provable in bankruptcy.”

Section 17 provides:

“(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a *tax* levied by the United States, the State, county, district or municipality in which he resides.”

Section 57J provides as follows:

“*Debts* owing to the United States, a State, a County, a district or a municipality as a penalty or forfeiture shall not be *allowed*, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.”

In the foregoing provisions is found a distinct recognition of the existence of three classes of claims of the United States:

- (A) Taxes;
- (B) Debts owing as penalties;
- (C) Debts generally.

Furthermore, debts owing to the United States are referred to in Section 57 and debts due any *person* entitled to preference by the laws of the United States are referred to in Section 64.

Having thus clearly indicated an intention that all debts of the United States are within the purview of and subject to the provisions of the Act, Congress in Section 64 provided for certain priorities.

In that Section again there is a clear distinction between taxes and debts. The order of priority is provided for as follows:

(a) All *taxes* due and owing to the *United States*, the State and political subdivision.

(b) Cost to preserve the estate.

(c) Filing fees and expenses of creditors who have recovered assets.

(d) Cost of administration.

(e) Wages.

(f) *Debts* owing to any *person* who by the laws of the States or the United States is entitled to priority.

Reading the Act alone, it appears that Congress had in mind the various classes of debts due to the United States and deliberately determined just what indebtedness of the bankrupt

should be entitled to prior payment and that it concluded that ordinary debts due the United States should not be given such a priority and should be allowed and discharged as private debts.

#### **History of the Act of 1898.**

The history of the Act in Congress substantiates this view:

For some years prior to 1898, there was an agitation for the enactment of the Bankruptcy Law. A bill was drawn by Judge Torrey, which was introduced in the House in the early '90s and considered at successive sessions of Congress. Finally Speaker Henderson introduced in the House (H. R., 8110) a bill, which embodied the essential provisions of the Torrey bill, and having been referred to the Judiciary Committee, it was favorably reported by that Committee on April 13, 1896 (Cong. Record, 54 Cong., 1 Sess., p. 3931).

That bill provided:

#### **Section 64: *Debts which have Priority.***

(a) *Debts owing to the United States, a State, a county, a parish, or a municipality, after being proved and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.*

(b) The debts to have priority except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be . . .

5. Debts owing to any person who by the laws of the States or the United States is entitled to priority."

In April, 1897, a similar bill was reported by

the Senate Judiciary Committee. The bill, as reported, contained the following (Cong. Record, 55 Congress, 1st Session, pp. 601-609):

SECTION 65: Debts which have priority

(a) *Debts owing to the United States, a State, County, Parish, being a political corporation, District, or Municipality, after being allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.*

(b) (1, 2, 3 and 4 are like the present Section 64). "5. Debts owing to any *person* which by the laws of the United States, or a State are entitled to priority."

The bill was not enacted as reported but Senator Nelson on April 22, 1897, offered a substitute bill which passed the Senate on that day. That bill provided as follows (Cong. Rec., 55 Congress, 1st Session, p. 800):

"SEC. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to wit:

FIRST.—Debts due to servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petition.

SECOND.—Taxes or revenues due the United States.

THIRD.—Taxes due any State or Territory or the District of Columbia.

FOURTH.—Taxes due any county, parish, etc."

The bill was referred to the House Committee and that body eventually reported back another bill (Congressional Record, 55th Congress, 2nd Session, pages 1777, 1784). That bill contained the provision as to priorities now contained in the act.

The bill passed the House and went to the Senate. Thereafter a conference committee agreed upon a bill which contained the same provision as in the House bill (Senate Document 294, 55th Cong., 2nd Session) and this bill became a law.

In *Guarantee Co. vs. the Title Guaranty Co.*, 224 U. S., 152 (1911) the question was whether a surety subrogated to the rights of the United States was entitled to priority of payment over a labor claim. It was urged that the United States was not bound by the provisions of the Bankruptcy Act and that under the provisions of the Act of 1797 (now Revised Statutes, Section 3466), the Government was entitled to a prior payment irrespective of the provisions of the Bankruptcy Act.

This Court reviewed the legislation and authorities, particularly *Lewis vs. United States* above referred to, and held that the labor claim was entitled to a preference. Justice McKenna said:

“The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of ‘all debts due to the United States, and all taxes and assessments under the laws thereof.’ The priority, therefore, given by the Bankruptcy Act was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the statute of 1797. *But there is no such affirmation by the Bankruptcy Act of 1898 of*

*that statute, which still exists, as we have said, as Section 3466 of the Revised Statutes, supra. There is a change in provisions, and we come to the question if there is a change of purpose. A consideration of those provisions becomes necessary. We shall quote those only which affect the United States. They are as follows:—*‘Section 1. (9) Creditor shall include any one who owns a demand provable in bankruptcy’ (Sec. 17). A discharge in bankruptcy releases the bankrupt from all of his provable debts except such as are due as a tax levied by the United States (Sec. 57-J). Debts owing to the United States as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty arose.

“Priority is provided for in Section 64 as follows: ‘(a) The Court shall order the trustee to pay all taxes legally due the United States. (b) Debts to have priority, except as herein provided, and to be paid in full, \* \* \* and the order of payment shall be: (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of the proceedings; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.’

“With these provisions we may compare Sections 5091 and 5101 of the Revised Statutes, which are reproductions of the act of 1867. Section 5091 provided that creditors whose debts were duly proved and allowed should be entitled to share pro rata without any priority or preference except as allowed in Section 5101. The latter section (5101) provided as follows:

“‘In the order for a dividend, the following claims shall be entitled to priority. and to be first paid in full in the following order:



“ \* \* \* Second. All debts due to the United States, and all taxes and assessments under the laws thereof. \* \* \* Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted \* \* \* ”

“It will be seen, therefore, that by the statute of 1797 (now Section 3466) and Section 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages, due any operative, clerk or house servant. A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is ‘taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.’ *These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment.* The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign in favor of those who necessarily depended upon their daily labor. And to give such claims priority could, in no case, seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimant.”

In the *Guarantee Company* case in the court below (174 Fed., 385), it was held that the absence of words giving priority to debts of the United States in the Act of 1898 had no more significance than their presence in the Act of 1867, but of course this construction was overruled by the Supreme Court.

And so too the decision in *Matter of Stoevers*, 127 Fed., 394, decided before the *Guarantee Co.* case is no authority here for it is based on a principle held inapplicable to the Bankruptcy Act of 1898—namely that the rights of United States under the latter act are the same as under that of 1867.

In *Matter of Hibner Oil Co.*, 264 Fed., 667, a debt due the United States was awarded a preference but the right to such preference was not discussed or determined, for the Court said:

“If the claim is property of and constitutes a debt due to the United States then *concededly* its priority was properly found.”

At page 10 of the appellant's brief in that case, a copy of which has been examined by counsel, appears the following statement:

“The appellant herein admits that contractual debts due to the United States of America are fifth in order of payment in a bankruptcy case, or have priority over general unsecured creditors, but the trustee contends, etc.”

Of course, no such concession is made in the case at bar because in each of the Bankruptcy Acts debts due the United States have been carefully distinguished from debts due persons who, by the laws of the United States, are entitled to

a preference and there is no basis for the assumption that Congress intended to include in the term "Debts due persons" debts which are due the United States.

In *U. S. vs. National Surety Co.*, 254 U. S., 73, the Surety Company's claim to share in the distribution of the bankrupt's estate *pro rata* on an equality with the Government was based on the provisions of Section 3468 of the Revised Statutes and not on the absence of priority to the government under the bankruptcy act, and while this Court held that the Government's claim was entitled to prior payment because of the provisions of Section 3466, yet the briefs and opinion in that case indicate that the question now presented for decision was neither raised nor decided. No reference was made to the provisions of Section 64 of the Bankruptcy Act, to the earlier bankruptcy acts nor to the decision in the *Guarantee Co.* case. The court simply determined the relative rights of the Government and the surety under the Revised Statutes without being asked to and without, in fact, considering the effect of the bankruptcy act upon those provisions. That case therefore cannot be deemed an authority on the question here.

In *McPhee vs. United States*, 64 Colo., 421, one of the questions was whether a provable debt of the United States, not a tax, was released by the discharge of the debtor. The Supreme Court of Colorado held that it was, and after pointing out that Section 17 of the Act explicitly provided that a discharge in bankruptcy releases the bankrupt from all his provable debts, except such as are due for taxes levied by the United States, the Court said:

"If Congress found it necessary, as it did, to expressly except taxes due the

United States, etc., from the operation of a discharge, it would seem that, if it intended that other debts due the United States should be excepted, it would have so declared. The omission of any exception of such debts is significant. The insertion of the provision with respect to taxes, without a like provision in regard to ordinary debts due to the United States, must be attributed to some purpose on the part of the lawmaking body. The purpose in view, we think, was that a bankrupt should be discharged from provable debts, to whomsoever owed, except as specified \* \* \* *The United States, when it engaged in business enterprises, should be subject to the same laws and occupy no different position than individuals when so engaged."*

From the foregoing discussion, it would appear that both the Bankruptcy Acts of 1841 and 1867 gave specific priority to the United States for debts, and separately for taxes, and that the Act of 1867, in addition, provided a priority for all debts due any person who, by the laws of the United States, was entitled to a preference; that the early bills introduced prior to the enactment of the 1898 Act modified the language of the Act of 1867 and limited the Government's priority to debts which were a lien and that the bill, as finally enacted, specifically limited the government's priority to taxes, continuing the separate priority given in the earlier acts to persons who, by the laws of the United States, were entitled to preference.

It further appears that only debts for taxes are not to be discharged and that debts for penalties are to be allowed only for the actual damage sustained.

If, as stated in the *Guaranty* case, these changes

were not inadvertent and the Act takes into consideration the whole range of indebtedness of the bankrupt, national, state and individual, and assigns the order of payment, the intent of Congress is clear to curtail the rights of the Government and upon ordinary debts to place the Government upon the plane of an ordinary citizen. If the intention had been to give it priority for ordinary debts as distinguished from taxes, it is hardly conceivable that the draftsmen of the Torrey bill and the subsequent bills which led to the enactment of the Act of 1898 would have deliberately removed from the Act of 1867 the express priority for debts due the United States contained in Section 27 of the Act of 1867, and first would have limited such priority to debts which are a lien and finally to taxes. If the intention was to continue the priority contained in Section 3466 of the Revised Statutes, the language of the Act of 1867 would have been retained. As the Statute stands to-day, if the United States is to have a priority for the payment of its ordinary debts, it may be asked over which classes of claims is this preference to be granted. Can it be said that Congress intended labor claims referred to in Subdivision 4 of Section 64 to be preferred and that debts due the United States shall come next and finally claims of persons who, by the Laws of the United States, are given a preference; or in view of the history of Subdivision 5, can it be said that the term "persons," as therein contained was intended to include the United States? If not, is it not mere judicial legislation to insert either before or after Subdivisions 5 a new provision for the prior payment of debts due the United States?

The logical conclusion from the history of the 1898 Act and its interpretation in the *Title Guarantee* case must be that the Bankruptcy Act con-

tains within itself all provisions for preferences which Congress intended to give in the distribution of the bankrupt estate.

### **The Reasons Underlying the Change.**

The reasons moving Congress no longer to give a preference to ordinary debts due the United States are entirely understandable.

The right of priority of the United States is wholly statutory and priority was given for the purpose of sustaining the public burdens.

In *United States vs. Bank of North Carolina*, 6 Peters, 29, 35, the Court said:

“The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, *in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes.* The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms.”

The first preference was given by the Act of 1797. In those days, the Republic needed all moneys which it could obtain from any source and it was apparently deemed wise to secure prior

payment of Government moneys no matter from what source they were due or for what reason, even at the expense of the private general creditors of the bankrupt; and so, throughout the earlier years of the country's history and at the close of the Civil War with its strain on government revenues, it was apparently deemed essential that the preference contained in the Act of 1797 should be continued by the Act of 1867 and that the private creditor must sacrifice his rights of equality for the public good.

In 1898, a different condition prevailed. The nation was rich and prosperous. The need for sustaining the "public burdens" was not so pressing. Government activities and dealings with the ordinary citizens were increasing. The absence of a national bankruptcy law had led to grave abuses and one of its underlying purposes was to provide for the equality of divisions of assets between creditors. Of necessity, the taxes must be preferred for the Government must have its revenue for operation, but no apparent reason appeared at that time why the Government should be preferred in the payment of claims (to use the language of Justice McKenna), "growing out of personal conventions as distinguished from civil obligations." The Act expressly provides that all debts due the United States, except taxes, are discharged and that debts for penalties should not be allowed, except as indicated. The obvious intention was that ordinary debts due the United States should be proved, allowed and in every respect should be subject to the provisions of the Act.

No reason can be advanced why this is not an enlightened and proper public policy.

As early as 1805, Mr. Justice Washington in his dissenting opinion in *U. S. vs. Fischer*, 2

Cranch., 358, 402, rebelled against the construction of the Act of 1797 which preferred the United States over private creditors on ordinary debts. He said:

“The nature of the debt may well warrant a discrimination; but not so, if the privilege be merely of a personal nature. The sovereign may, in the exercise of his powers, secure to himself this exclusive privilege of being preferred to the citizens, but this is no evidence that the claim is sanctioned by the principles of immutable justice. If this right is asserted, individuals must submit; but I do not find it in my conscience to go further in advancement of the claim, than the words of the law, fairly interpreted, in relation to the whole law, compel me. But I do not think that Congress meant to exercise their power to the extent contended for. First, because in every other section of the law they have declared a different intent; and secondly, because it would not only be productive of the most cruel injustice to individuals, but would tend to destroy, more than any other act I can imagine, all confidence between man and man. The preference claimed is not only unequal in respect to private citizens, but is of a nature against which the most prudent man cannot guard himself. As to public officers, and receivers of public money of all descriptions, they are, or may be known as such; and any person dealing with them, does it at the peril of being postponed to any debt his debtor may owe to the United States, should he become unfortunate. He acts with his eyes open, and has it in his power to calculate the risk he is willing to run. *But if this preference exists in every possible case of contracts between the United States and an individual, there is no means by which any man can be ap-*



*prised of his danger in dealing with the same person."*

How much truer were these words in 1898. Then the government was a contractor and a buyer in the chief centers of the country. The business relations of the Government with its citizens have increased enormously since that time through its various agencies, departments and enterprises, and the smallest merchants find themselves in contractual relation with the government. In view of this situation, did not Congress deliberately omit the preference of the Government's ordinary debts, because it was believed that when the Government contracted with the ordinary citizen, it should have no greater or other rights than other contractors or creditors of the persons with whom it might deal. If the contrary be the law, then in these days of Government activities and business depression, no one can safely give credit to any mercantile concern which has Government contracts. For if bankruptcy ensues the entire assets may be payable to the Government as damages and the private merchants will receive nothing.

It is submitted that this Court should now hold that by the very language of the Act of 1898, in the light of its history, and from considerations of sound public policy Congress has determined that the early rule should no longer obtain, that the Act of 1898 is all inclusive, and that debts due to the Government growing out of private conventions should be treated on a par with the debts due the ordinary citizen and that the losses which the government may sustain should not be borne *by the other creditors of the bankrupt*, but should be paid from the general revenues contributed by all the people.

If this conclusion is correct then even if the debt here be due the United States of America and not the Fleet Corporation it is not entitled to prior payment and the order below is correct.

Respectfully submitted,

GODFREY GOLDMARK,  
Counsel for Respondent.



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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1926.

No. 536.

In the Matter of

THE EASTERN SHORE SHIPBUILDING CORPORATION, PETITIONER,  
v.  
UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, RESPONDENT,  
REPRESENTING THE UNITED STATES OF AMERICA.  
Petitioner.

ROGER L. MOORE, Counsel for Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

GUTHRIE C. GILBERT,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

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**No. 526.**

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IN THE MATTER OF

THE EASTERN SHORE SHIPBUILDING CORPORATION, BANKRUPT; UNITED STATES SHIPPING BOARD, EMERGENCY FLEET CORPORATION, REPRESENTING THE UNITED STATES OF AMERICA, PETITIONER,

*against*

ROGER B. WOOD, TRUSTEE IN BANKRUPTCY,  
RESPONDENT.

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**SUPPLEMENTAL BRIEF FOR RESPONDENT.**

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The principal brief for the respondent was completed before the Government's brief was received, and as the latter materially narrows the question presented, it is deemed proper to submit this short supplemental brief.

The question here is: Did the Fleet Corporation contract with the Eastern Shore Corporation as a principal and in-

dependent contractor or as a true agent of a disclosed principal—the United States? If it did not contract as a true agent, then the debt is not due the United States, even if any dividend in bankruptcy enures to the benefit of the United States as stockholder.

With much of the argument of the Government which relates solely to the Sloan and Astoria cases the respondent has no concern. The respondent is not seeking affirmative relief against the Fleet Corporation. The provisions of the Merchant Marine Act of 1920, providing a remedy against the United States and transferring the property of the Fleet Corporation to the Shipping Board, are not claimed by the Government to affect this case. The rights here must be determined at the time the contract was made and at the time the petition in bankruptcy was filed, in March, 1919.

The petitioner now concedes (p. 87) that the fact that the Shipping Board is the record holder of all of the capital stock of the Fleet Corporation, save qualifying shares of directors, does not confer upon the Fleet Corporation the privileges and rights of a sovereign. Accordingly, the United States has no greater rights, by virtue of such stock ownership, than if an ordinary private business corporation were the "owner" in the contract of August, 1918. A consideration of the various acts passed subsequent to the Act of 1917 shows that Congress recognized the status of the corporation as being that of the ordinary private corporation and an independent contractor, and intended that it should occupy that status, except as the practical workings of the scheme from time to time required specific legislation to the contrary.

**As to Historical Background (p. 8).**

With the elaborate historical review presented by the petitioner to show that at the time the Act of June, 1917, was enacted this country was in dire need of ships, the respondent has no quarrel, and so, also, it is conceded (assuming this court will deem the contract here to have been made pursuant to the Act of June 15, 1917, and not pursuant to the general powers of the corporation, of which fact there is no proof) that the Fleet Corporation was a Federal instrumentality, chosen to aid in winning the war. But ever since the creation of the first United States bank Congress has chosen corporations as the means of effectuating the powers vested in it, and never before has such a corporation been considered a true agent of the Government, so that the contracts and acts of the corporation became those of the Government. This fact was known to Congress when it, in effect, chose the Fleet Corporation to act and for that very reason it made the choice. Because there was such a dire need for ship construction it was deemed essential that a method be employed which would bring results with a minimum of delay, and delay in Government contracting is notorious. And this could only be accomplished by employing an independent contractor. The footnote on page 22 of petitioner's brief clearly sustains this view, for there is quoted with approval the statement that the Fleet Corporation was chosen so that the Shipping Board could contract with it just as freely as with any private shipbuilder, and by that expedient technically avoid the red tape of Government procedure. From the very language of the Act of 1917, providing that the monies were to be spent as other monies

of the corporation, to wit—its own capital—and from the discussion that appears on page 32 of the respondent's principal brief, it is evident that Congress intended that the Fleet Corporation would be employed by the President and that the underlying purpose was to enable the corporation to contract as a principal and as an independent contractor, and wholly in a different manner than would be employed by the ordinary Government agent. Through its control of the capital stock and therefore of the Board of Directors, the Government was to benefit by the operations of the corporation and its contracts. Contracts were to be made by the Fleet Corporation as "owner," just as a private corporation would make them, money was to be expended just as the company's capital was to be expended. The Government advanced the money to the corporation just as it advanced bonds to the Union Pacific Railroad Company and advanced capital to the War Finance Corporation. The corporation operated through its own representatives (Strang case). At the height of the corporation's activities during the war period, the Government was only too anxious to maintain that the corporation was free from restraints and that it had the powers and obligations of a private contractor.

**As to the Petitioner's First Point (p. 35).**

The very provisions of the contract between the Fleet Corporation and the bankrupt indicate that the statements that all the contracts and acts of the corporation were not made in its own interest is not the fact. As has already been pointed out at length in Respondent's Brief, page 39, *et seq.*, the contract describes the Fleet Corporation as owner and



carefully distinguishes between the rights of the owner and the United States. It provides for a distinct title in the corporation of materials which were to go into the boats, and carefully provides for precedence in the work of any Government department. These provisions are wholly inconsistent with the theory now advanced that the Fleet Corporation had no rights or interests distinct from the United States itself. Of course the United States had the beneficial interest, just as any stockholder of a corporation is the beneficiary of its activities. Much is made of the phrase "representing the United States of America," found in the original contract but not in the supplemental ones. In view of the other provisions of the contract the clause is unimportant. As every corporation represents its stockholders and as every Federal instrumentality represents the United States, so did the Fleet Corporation. The draftsman of the contract, however, was careful to avoid providing that the United States by the Fleet Corporation as its agent, was the contracting party.

**As to Congressional Recognition of the Fleet Corporation as a Governmental Department (Petitioner's Brief, p. 49).**

The argument advanced and the examples quoted in the footnote at page 49 of petitioner's brief show, not that Congress subsequently recognized the Fleet Corporation to be a Governmental department, as is urged, but quite to the contrary they show that Congress recognized that the corporation was *not* such a department, and that insofar as it became desirable and expedient that principles or statutes which were applicable to Government departments should be made

applicable to the Fleet Corporation, *special legislation was necessary*. This, in effect, was the view of this Court in the *Strang* case, 254 U. S., 491, where this Court pointed out that Congress had provided that the Fleet Corporation should be considered a Government agency, established *for the purpose* of the section with respect to the transfer of employees and had extended the scope of section 35 of the Criminal Code, so as to render it criminal to defraud a corporation in which the United States owned stock. Another statute which clearly indicates that Congress recognized the true status is the Suits in Admiralty Act of March 9, 1920, 41 Stat. at L., 525, which provides that any vessel owned by the United States or *by any corporation in which the United States or its representatives, shall own the entire outstanding capital stock* or in the possession of the United States, or of such corporation shall thereafter not be subject to arrest or seizure by judicial process. Further examples are found in petitioner's brief in the footnote, page 49.

There is no statute which provides that contracts made with the Fleet Corporation shall be deemed made with the United States, nor any statute which provides that debts due any corporation in which the United States or its representatives shall own the entire outstanding capital stock, shall be deemed to be debts due the United States and entitled to prior payment. Perhaps if this Court affirms the decree below, Congress will be importuned to enact such a statute just as it passed amendatory laws following the decision in *The Lake Monroe* and the *Strang* cases. Whether such legislation would be wise is now immaterial.

**As to Whether the United States Itself is Entitled to Prior Payment of Ordinary Debts as Distinguished From Taxes.**

The petitioner's argument seems to be that the United States itself is a "Person" within the meaning of Subdivision 5, Section 64 of the Bankruptcy Act, and that by virtue of Section 3466 of the Revised Statutes, a claim of the United States is entitled to priority over the claims of other "Persons" entitled to priority.

The history of Subdivision 5, Section 64, as outlined in respondent's principal brief indicates that at no time did Congress intend that the term "Person entitled to preference" should include the United States itself, for the act of 1867, provided separately for the prior payment of debts due the United States and debts due "Persons" entitled to priority and this distinction was continued in the various bills which preceded the act of 1898, such bills specifically providing for payment of debts due the United States which were a lien and separately for debts due "Persons entitled to preference." Finally the distinction was recognized in the act of 1898, as finally enacted, providing for the payment of taxes due the United States first, and providing separately for the payment of debts due "Persons." In view of these facts there is no basis for the contention that the United States itself was intended to be included within the provisions of Subdivision 5 of Section 64, and it is mere judicial legislation to include the United States in the term "Persons," and then to apply Section 3466 of the Revised Statutes to the class thus arbitrarily enlarged, and thus conclude that thereby the

United States obtains a preference. A reading of the whole bankruptcy act, in the light of its history, shows that just the contrary was intended and if for any reason present conditions require a different rule, the change must be obtained from Congress and not from the courts.

Respectfully submitted,

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